Significant Decisions of the Washington Appellate Courts Involving Washington's Growth Management Act 1999-2004

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INTRODUCTION

Washington's Growth Management Act (GMA) was adopted by the Legislature in 1990 and 1991. By 1993, the first published appellate decision referencing the GMA appeared.[1] Over the next two years, other decisions cited to the GMA or discussed it without significant interpretation.[2] The first published appellate decision squarely interpreting a provision of the GMA was issued in 1995.[3] In 1998 the Washington Supreme Court issued its first substantive interpretation of the GMA.[4] By mid-1999, there had been enough appellate decisions issued on the GMA to warrant a law review article discussing the rulings to date.[5] In that article, Professor Richard Settle wrote:

> The courts generally have embraced the purposes, goals, and central principles of the Act. Apparent judicial concern than uninformed, disgruntled citizens might undermine the legislature's statewide growth management goals has led the courts to deny the availability of referenda and initiatives to override GMA implementation decisions of local governing bodies. Facial constitutional challenges of core GMA requirements have been quite summarily rejected. . . . In dicta, the courts routinely recite the legislative findings supporting GMA's central purposes to concentrate growth in UGAs while protecting environmentally critical areas, natural resource industries, and efficient public facilities and services from the consequences of sprawl.
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> The courts seem to recognize that, unlike SEPA and SMA, GMA was spawned by controversy, not consensus. . . . Thus, broad interpretation of GMA requirements and deference to Growth Board decisions have not necessarily occurred. The courts have analyzed each issue in light of statutory language and legislative history to determine whether the legislature intended to impose an asserted requirement on local government, and, in cases of broad or ambiguous GMA requirements, whether the legislature intended local governments or the Growth Boards to "fill in the blanks."[6]

Professor Settle's observation provides a good starting point for reviewing the appellate decisions issued since 1999. With only a few exceptions, the decisions have remained within the legislative framework established in the GMA. The appellate courts have continued to embrace the purposes, goals, and central principles of the GMA, and they have continued to examine the specific requirements of the GMA in light of those purposes, goals, and principles, with moderate deference given to local governments and to the Growth Management Hearings Boards.

Following are brief summaries of significant decisions involving the GMA issued by the Washington Supreme Court and the Washington Courts of Appeals between June 1999 and October 2003. The summaries are not intended to include every issue discussed by the court in a

[1] *King County v. Boundary Review Board*, 122 Wn.2d 648, 860 P.2d 1024 (1993).

[2] In chronological order, *see Snohomish County v. Anderson*, 123 Wn.2d 151, 868 P.2d 116 (January 1994); *Jones v. King County*, 74 Wn. App. 467, 874 P.2d 853 (April 1994); *Erickson & Associates v. McLerran*, 123 Wn.2d 864, 872 P.2d 1090 (May 1994); *Save Our State Park v. Board of Clallam County Commissioners*, 74 Wn. App. 637, 875 P.2d 673 (June 1994); *Snohomish County Property Rights Alliance v. Snohomish County*, 76 Wn. App. 44, 882 P.2d 807 (September 1994), *review denied*, 125 Wn.2d 1025 (February 9, 1995); *Snohomish County v. Anderson*, 124 Wn.2d 834, 881 P.2d 240 (October 1994); *Whatcom County v. Brisbane*, 125 Wn.2d 345, 884 P.2d 1326 (December 1994); *Vashon Island Committee for Self-Government v. Boundary Review Board*, 127 Wn.2d 759, 903 P.2d 953 (October 1995).

[3] *Matson v. Clark County Board of Commissioners*, 79 Wn. App. 641, 904 P.2d 317 (1995).

[4] *Skagit Surveyors & Engineers, LLC v. Friends of Skagit County*, 135 Wn.2d 542, 958 P.2d 962 (1998).

[5] Richard L. Settle, *Washington's Growth Management Revolution Goes to Court*, 23 Seattle Univ. L. Rev. 5 (1999).

[6] Settle, 23 Seattle Univ. L. Rev. at 31-34 (1999) (footnotes omitted).

particular case, but rather are meant to highlight the portions of the decisions that likely will have importance in the future for understanding and interpreting the GMA.

APPELLATE DECISIONS IN JUNE-DECEMBER 1999

King County v. Central Puget Sound Growth Management Hearings Board, 138 Wn.2d 161, 979 P.2d 374 (June 10, 1999) (amended Sept. 22, 1999).

Factual and Procedural Background

The Bear Creek area was an undeveloped area straddling a wooded plateau above the Snoqualmie Valley between the cities of Redmond and Duvall in King County. Approximately 2550 acres in the Bear Creek area, referred to as the Bear Creek Urban Planned Developments (UPDs), was owned by two large developers who proposed it for large-scale development. In 1991, King County and its cities adopted county-wide planning policies (CPPs) under RCW 36.70A.210; one of the CPPs designated the Bear Creek UPDs as an urban growth area (UGA). King County's comprehensive plan, adopted in 1994, included the Bear Creek UPDs within the designated Bear Creek UGA. King County subsequently issued project permits for the Bear Creak UPDs.

Two citizens groups challenged the County's decision to include the Bear Creek UPDs within the designated UGA. The Central Puget Sound Growth Management Hearings Board issued a Final Decision and Order in October 1995, holding that King County's CPPs required inclusion of the Bear Creek UPDs in the UGA. The citizens groups moved for reconsideration, arguing the Bear Creek UPDs could not properly be included in the UGA because they did not meet the criteria for UGA designation set forth in RCW 36.70A.110. In December 1995, the Board reversed its earlier decision, holding the CPPs were internally inconsistent, ambiguous, and not directive or binding on the County's exercise of discretion in adopting its final UGA. The Board also ruled the County had not adequately justified its decision to include the Bear Creek UPDs in the UGA. The Board remanded to the County with instructions to do one of the following: (1) delete the Bear Creek UPDs from the UGA; (2) make the Bear Creek UPDs a fully contained community if they met the requirements of RCW 36.70A.350; or (3) adequately justify their inclusion in the UGA under RCW 36.70A.110.

Three petitions for review in Superior Court followed. The County obtained review of the Board's decision in Superior Court, although it also took action to make the Bear Creek UPDs a fully contained community. The citizens groups filed a Land Use Petition challenging three County ordinances that approved project permits and zoning amendments for one of the Bear Creek UPDs, alleging the environmental impact statement (EIS) impermissibly considered an alternative not allowed under applicable zoning. The citizens groups also challenged a compliance order the Board issued in May 1996. The three petitions were consolidated by the Superior Court, which: (1) reversed the Board in part, concluding the Board erroneously interpreted the County's CPPs, ruling the CPPs were directive and mandated that the Bear Creek area be designated a UGA in the County's comprehensive plan; (2) rejected the citizens' challenge to the EIS and upheld the permits and zoning amendments as consistent with the UGA; and (3) dismissed the challenge to the compliance order as moot.

The Court of Appeals affirmed the Superior Court in a decision published at 91 Wn. App. 1, 951 P.2d 1151 (1998).

The Court's Decision

The Supreme Court affirmed in part and reversed in part.

CPPs may be directive. Under RCW 36.70A.210(6), only cities or the Governor may appeal a CPP to a Growth Management Hearings Board; the GMA does not provide for a public challenge to CPPs. On that basis, because the CPPs required the County's comprehensive plan to designate the Bear Creek

area as a UGA, the Board assumed the UGA designation could not be challenged at the time the comprehensive plan was adopted. The Supreme Court agreed CPPs may be directive:

> The CPPs are thus the major tool provided in the GMA to ensure that the comprehensive plans of each city within a county agree with each other. If the CPPs served merely as a nonbinding guide, municipalities would be at liberty to reject CPP provisions and the CPPs could not ensure consistency between local comprehensive plans.[7]

Comprehensive plan provisions may be challenged even if the provisions are mandated by CPPs. The Supreme Court disagreed, however, with the Board's conclusion that the directive character of CPPs immunizes them from citizen challenge when incorporated into the comprehensive plan. The Court reasoned that such immunity conflicts with two GMA provisions: (1) the requirement in RCW 36.70A.140 that counties provide for early and continue public participation in the development and amendment of comprehensive plans; and (2) the liberal right of appeal granted in RCW 36.70A.280(2)-(3). The Court also concluded that shielding such provisions from challenge undermines the schedule for UGA adoption in RCW 36.70A.110(5) by effectively allowing UGAs to be adopted at the time the CPPs are formulated. The Court held:

> Even if a county must follow uncontested CPP directives, once those provisions are adopted into the comprehensive plan they become subject to citizen appeal. . . . A UGA designation that blatantly violates GMA requirements should not stand simply because CPPs mandated its adoption. Rather, upon a determination that the provision violates the GMA, it should be stricken from both the comprehensive plan and the CPPs.[8]

The Court reinstated the Board's Order on Reconsideration and held the citizens groups' challenge to the compliance order was not moot. The Court remanded to the Board to determine whether King County's redesignation of the Bear Creek UGA as a fully contained community complied with the GMA.

A comprehensive plan provision found not to comply with the GMA remains in effect unless the Board also enters a determination of invalidity. The Court rejected the citizens' challenges to King County's issuance of the project permits. The Board had found the Bear Creek UGA noncompliant with the GMA, but the Board did accept the citizens' invitation to enter a determination of invalidity. As provided in RCW 36.70A.302, absent an order of invalidity, the urban designation of the Bear Creek area remained valid during the remand period, and the County was free to rely on that designation when issuing the permit.

A reasonable, but legally questionable, alternative may be considered in an EIS. The developer's EIS included three alternatives: one-acre lots, five-acre lots, and no development. The citizens group argued the one-acre lot alternative should not have been considered because the developer had no legal right to develop at that density. The Court rejected the argument:

> [A]n alternative may be taken into account for comparative purposes in an EIS, even if the alternative's legal status is contested. . . . An alternative considered for purposes of an EIS need not be certain or uncontested, it must only be reasonable.[9]

For further proceedings after remand, *see Quadrant Corp. v. Growth Mgmt. Hrgs. Bd.* ___ Wn. App. ___, 81 P.3d 918 (2003) (below at page 42).

[7] 138 Wn.2d at 175.

[8] 138 Wn.2d at 176.

[9] 138 Wn.2d at 183.

Honesty in Environmental Analysis & Legislation (HEAL) v. Central Puget Sound Growth Management Hearings Board, 96 Wn. App. 522, 979 P.2d 864 (June 21, 1999) (amended Aug. 25, 1999).

Factual and Procedural Background

In 1995, the City of Seattle amended its critical areas regulations and policies upon which the regulations are based. The amendments involved regulations addressing development on steep slopes. HEAL and seven named individuals challenged the amendments, arguing the City had not included the best available science as required under RCW 36.70A.172(1). The Central Board held its review was limited to whether the City included the best available science during the development of the amendment, not whether the amendment was supported by the science in the record of development. The Board specifically rejected HEAL's argument that the City must rely on scientific information supplied to it, rather than scientific information it developed, holding instead that RCW 36.70A.172(1) does not require that the amendment reflect scientific information from either source. The Board held the City properly included the best available science in amending its steep slope regulations, but the Board concluded it had no jurisdiction to review the City's critical areas policies.

HEAL appealed to Superior Court, which ruled the Board had jurisdiction to review the City's critical areas policies The Court also held the Board had misinterpreted RCW 36.70A.172(1) and that the statute requires inclusion of best available science in a substantive way to guide decision-making. The City appealed to the Court of Appeals.

The Court's Decision

The Court of Appeals affirmed in part and reversed in part.

Growth Management Hearings Boards may review critical areas policies for compliance with the best available science requirement. The Court of Appeals agreed with the Board that the GMA does not require local governments to adopt critical areas policies. Affirming the Superior Court, however, the Court of Appeals held that if a city or county chooses to adopt critical areas policies, the Board has jurisdiction under RCW 36.70A.280 to review the policies to determine whether the city or county complied with the requirements of RCW 36.70A.170 and .172(1).[10]

Local governments must give substantial consideration to the best available science when developing critical area policies and regulations. The Court of Appeals rejected the argument that the best available science requirement is purely procedural, requiring only that the science be included in the record. The Court also rejected the contention that a critical area policy or regulation must precisely mirror the best available science in the record. The Court instead took a middle approach, holding that local governments must give substantive consideration to the best available science. The Court explained:

> Best available science must be "included" in the record, but . . . mere inclusion is not all that is required. The GMA requires balancing of more than a dozen goals and several specific directives in implementing those goals. . . . [T]he Legislature left the cities and counties with the authority and obligation to take scientific evidence and to balance that evidence among the many goals and factors to fashion locally appropriate regulations based on the evidence, not on speculation or surmise.
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> Whether scientific evidence is respectable and authoritative, challenged or unchallenged, controlling or of no consequence when balanced against other factors, goals and evidence to be considered, is first in the province of the city or county to decide. Then, if challenged, it is for the Growth

[10] 96 Wn. App. at 528. The court inadvertently referred to RCW 36.70A.171 (which does not exist), rather than RCW 36.70A.170.

> Management Hearings Board to review. The Legislature has given great deference to the substantive outcome of that balancing process. We hold that evidence of the best available science must be included in the record and must be considered substantively in the development of critical areas policies and regulations.[11]

The best available science requirement is intended to ensure that critical areas regulations are not based on "speculation and surmise." The Board and the Superior Court disagreed about the substantive effect of RCW 36.70A.172(1). To resolve the disagreement, the Court of Appeals turned to a federal case analyzing an analogous requirement in the federal Endangered Species Act. Borrowing from the federal case, the Court of Appeals described the best available science requirement as intended "to ensure that regulations not be based on speculation and surmise."[12] To emphasize the point, the Court of Appeals suggested the best available science requirement may have constitutional ramifications:

> [T]he policies and regulations adopted under the GMA must comply with the nexus and rough proportionality limits the United States Supreme Court has placed on governmental authority to impose conditions on development applications. If a local government fails to incorporate, or otherwise ignores the best available science, its policies and regulations may well serve as the basis for conditions and denials that are constitutionally prohibited.
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> . . . The science the legislative body relies on must in fact be the best available to support its policy decisions. . . . [I]t cannot ignore the best available science in favor of the science it prefers simply because the latter supports the decision it wants to make. If it does so, that decision will violate either the nexus or rough proportionality rules or both.[13]

Nolte v. City of Olympia, 96 Wn. App. 944, 982 P.2d 659 (Aug. 20, 1999).

This decision did not interpret the GMA, but it is included here because it involved issues that bear on local governments' implementation of the GMA.

Factual and Procedural Background

Before adopting a comprehensive plan under the GMA, the City of Olympia and Thurston County agreed they would plan jointly for the UGA adjacent to the City's municipal boundary. The agreement was carried forth in their comprehensive plan, which provided that the City would fund roads and neighborhood parks in the unincorporated UGA and the County would collect impact fees from new development in UGA to defray the costs of providing those services. The City and County also adopted parallel sewer and water ordinances providing that as a condition of connection to property in the UGA, an applicant must: (1) either annex to the City or execute a utility extension agreement (UEA); and (2) pay an impact fee for parks, fire protection facilities, and schools.

A developer applied for approval of a proposed plat for a planned residential development in the unincorporated UGA. The developer entered into a UEA with the City of Olympia, in which the City agreed to provide water and sewer connections and the developer agreed to future annexation and to pay the impact fees referenced above.[14] The developer then filed an action in Superior Court alleging the City could not lawfully impose impact fees and asking the Court to order the City to provide

[11] 96 Wn. App. at 531-32.

[12] 96 Wn. App. at 531.

[13] 96 Wn. App. at 533-34.

[14] The use of utility extension agreements in this type of situation was at issue in *Grant County Fire Protection District No. 5 v. City of Moses Lake*, 145 Wn.2d 702, 42 P.3d 394 (2002), which held the petition method of annexation violated Art. I, § 12 of the Washington Constitution. This discussion is discussed below at page 44.

water and sewer service without charging impact fees.

The Superior Court held the City lacked statutory authority to impose impact fees outside its municipal boundary and could not do so. The Court struck the impact fee provisions from the UEA, but held the remainder of the UEA was mutually enforceable and valid. The city appealed to the Court of Appeals.

The Court's Decision

The Court of Appeals affirmed in part and reversed in part.

The City was not statutorily authorized to impose impact fees on development outside its municipal boundary. The Court rejected the City's argument that the impact fees were imposed either by the County or by the City and County jointly. The Court held they were City impact fees and that the City had no statutory authority to impose the impact fees.

RCW 36.70B.170 authorizes the City to enter into a development agreement outside its boundary as part of a proposed annexation or a service agreement. Although that statute provides that the development agreement may include "impact fees imposed or agreed to in accordance with any applicable provisions of state law," the Court held this authority is limited by RCW 36.70B.210, which provides that RCW 36.70B.170 grants no authority to impose impact fees; rather, impact fees must be "expressly authorized by other applicable provisions of state law."

The Court found no other provision of state law authorizing the City to impose impact fees outside its municipal boundary. The Court read RCW 82.02.050 through .090 and RCW 58.17.110 as authorizing impact fees only within the municipal boundary. The Court, relying on RCW 82.02.020, also rejected the City's argument that it could impose impact fees outside its municipal boundary in its role as a utility provider.

Because an "essential part" of the UEA was stricken, the City was not obligated under the UEA. The Court of Appeals reversed the Superior Court's ruling that the City was bound by the UEA after the impact fees provision was stricken. Relying on basic contracts law, the Court held the impact fees provision was an "essential part" of the contract, such that the City would not have entered into the UEA absent inclusion of that provision. The Court held the UEA could not be enforced against the City.

As the sole provider of water and sewer service in the UGA, the City had a public duty to provide the service. The Court held the City has a public duty to serve all land within the UGA, since it is the exclusive provider of water and sewer service to the UGA. Although the City was not bound by the particular contractual duty in the UEA signed by the developer here, the City "must perform its public duty in the manner provided by law."[15]

Duwamish Valley Neighborhood Preservation Coalition v. Central Puget Sound Growth Management Hearings Board, 97 Wn. App. 98, 982 P.2d 668 (Aug. 23, 1999).

Factual and Procedural Background

A neighborhood coalition challenged amendments to King County's comprehensive plan and development regulations that redesignated a parcel of land in the Duwamish Valley. They alleged the County did not comply with the GMA's public participation requirements. The Central Puget Sound Growth Management Hearings Board denied the coalition's motion to supplement the record and held the coalition lacked standing to raise an issue regarding the County's SEPA compliance. The coalition appealed and the Superior Court affirmed the Board.

The Court's Decision

The Court of Appeals reversed on one issue.

The Court held the Board should have allowed the coalition to supplement the record. In an unpublished part of the decision, the Board

[15] 96 Wn. App. at 959.

explained that the Board had authority to grant the coalition's motion to supplement the record—especially, as here, where the coalition's evidence was offered as rebuttal evidence in support of allegations that the County failed to provide the notice and opportunity to participate required under the GMA. The Board's refusal to admit that evidence, without explaining its reasons for its decision, was error.

Growth Management Hearings Boards are not liable for attorney's fees under Washington's Equal Access to Justice Act when they decide GMA petitions. The Court also rejected the coalition's request for attorney's fees against the Board, agreeing with the Board that Washington's Equal Access to Justice Act, RCW 4.84, does not apply to a decision of a purely adjudicative body such as the Board, rendered in the course of an adjudicatory proceeding:

> The County, not the Board, is the Coalition's adversary. The Board was acting as an adjudicative body, and is but a nominal party in the judicial proceedings. To award fees against it would be akin to awarding fees against the trial court when an appellate court reverses its decision, and would be inappropriate.[16]

City of Bellevue v. East Bellevue Community Council, 138 Wn.2d 937, 983 P.2d 602 (Sept. 9, 1999).

This decision did not interpret the GMA, but it is included here because it involved issues that bear on some local governments' implementation of the GMA.

Factual and Procedural Background

Before the GMA was enacted, the City of Bellevue used an "open zone" zoning designation to protect environmentally sensitive areas. Between 1989 and 1993, the City eliminated the designation as it revised its comprehensive plan, creating instead more specific land use designations, some of which allowed residential development at a range of possible densities.

The East Bellevue Community Council had authority under RCW 35.14.040 to approve or disapprove comprehensive plan amendments and rezone ordinances affecting land within that portion of the City governed by the Council. The Council approved the comprehensive plan amendments, but disapproved of several rezones the City adopted to implement the comprehensive plan in the Crossroads area of Bellevue. The Council was concerned that the rezones were inconsistent with the City's comprehensive plan policies regarding traffic congestion and environmentally sensitive areas.

The City sued in Superior Court, alleging the Council's disapproval of the rezone ordinance was arbitrary and capricious and contrary to law. The Superior Court agreed, ruing the Council did not have authority under RCW 35.14.040 to disapprove the rezone ordinance because the designations in the rezones were consistent with the land use designations in the comprehensive plan amendments previously approved by the Council.

The Council appealed and the Court of Appeals, in a decision published at 91 Wn. App. 461, 957 P.2d 267, affirmed.

The Court's Decision

The Supreme Court reversed.

Community Councils exercising their discretion under RCW 35.14.040 must comply with the GMA. The Supreme Court held RCW 35.14.040 authorized the Council to determine, independent of the City, whether to approve or disapprove land use legislation affecting territory within the Council's jurisdiction. The Court rejected the City's contention that the Council already had exercised its discretion by approving the comprehensive plan amendments. Because the Council had independent discretion under RCW 35.14.040 and was not just a reviewing body, the Court held it was not necessary for the City's decision to have been

[16] 97 Wn. App. at 101.

wrong in some respect before the Council could disagree with it.

The City argued that the GMA barred the Council's action because that action put the City's zoning out of compliance with its amended comprehensive plan. The Court rejected that argument, noting both the Council could not disregard applicable provisions of the GMA and that the City had the option of rezoning in conformity with the comprehensive plan.

City of Des Moines v. Puget Sound Regional Council, 97 Wn. App. 920, 988 P.2d 993 (Nov. 15, 1999), *review denied*, 140 Wn.2d 1022 (June 6, 2000) (*Des Moines I*).

Factual and Procedural Background

In 1996, the Puget Sound Regional Council (PSRC) amended the Regional Transportation Plan (RTP) for central Puget Sound to include planning for a third runway at Seattle-Tacoma International Airport. Five cities adjacent to the airport, along with a school district and a communities coalition, challenged the decision to amend the RTP, alleging violations of the GMA and SEPA.

The Superior Court dismissed the challenges and upheld the PSRC's decision. On appeal to the Court of Appeals, the cities appealed a single issue: whether the GMA requires RTPs to comply with previously adopted local comprehensive plans.

The Court's Decision

The Court of Appeals affirmed the Superior Court's conclusion that local comprehensive plans cannot trump regional actions.

Regional transportation plans are planning documents, and are not required to impose specific mitigation measures on development. The Court of Appeals rejected the cities' argument that RTPs must impose site-specific mitigation measures to address construction and operation impacts on the surrounding communities, consistent with the provisions adopted in the comprehensive plans of those communities. The PSRC is a planning agency, not a permitting agency, and the RTPs are planning documents, not permitting decisions. While the PSRC has authority to impose mitigating conditions during the planning stage, it has no duty to do so. The Court, referencing the "federal, state, regional, county, and local regulations and conditions that will be placed on the construction,"[17] rejected the cities' prediction that mitigation would never be undertaken if not specifically imposed in the RTPs.

Regional transportation plans, if created through the cooperative process provided for in the GMA, prevail over inconsistent local comprehensive plans. The Court held the GMA does not require regional plans to conform to local comprehensive plans:

> Although the Legislature did not explicitly direct that regional plans should prevail over local plans if the two conflict, when construed as a whole, the GMA evinces the Legislature's intent to discard the traditional land use system in which each jurisdiction functioned as an isolated entity in favor of a scheme which stresses coordination, cooperation, and integration. In light of this legislative purpose, we agree with the PSRC that if the coordinated planning process does not result in consistency between regional and local plans, the regional plans must prevail.[18]

In reaching this conclusion, the Court rejected the cities' argument that RCW 47.80.023 explicitly requires the PSRC to achieve consistency with local plans, making it unnecessary for the Court to construe any other provision of the GMA.[19] Instead, the Court found RCW 47.80.023 requires consistency

[17] 97 Wn. App. at 928.

[18] 97 Wn. App. at 929.

[19] The Court of Appeals treated RCW 47.80.023 as part of the GMA. "Although the bulk of the GMA is codified in RCW 36.70A, RCW 47.80 contains the transportation elements of the Act. The Legislature adopted both chapters as part of a single legislative bill." 97 Wn. App. at 922 n.2.

from both regional and local plans without specifying which prevails. Calling that a "gap in the statutory scheme,"[20] the Court examined RCW 36.70A and RCW 47.80 as a whole to determine the intent of the Legislature. The Court found that King County's county wide planning policies (CPPs), adopted under RCW 36.70A.210, provided that the PSRC was to be the primary forum for the development of regional transportation systems plans and strategies. Formation of the PSRC itself was authorized by RCW 47.80.020, and RCW 47.80.030 expresses the Legislature's intent that transportation and land use planning should be governed by a coordinate, regional planning policy. The Court also relied on a letter from the Department of Community, Trade, and Economic Development (CTED) to the Washington State Department of Transportation explaining CTED's position "that if local and regional planners are unable to achieve consistency, a regional plan that embodies the broad sweep of the planning efforts of local governments throughout the region should govern land use decisions."[21]

The Court stressed, however, that regional planners may not "steamroll" local comprehensive plans in favor of regional goals:

> The purposes of the GMA are met only if city, county, and regional planners cooperate and coordinate. When this process occurs, as it did here, the regional plan should reflect choices and goals endorsed by the majority of the cities and towns within the region. To require unanimity among these jurisdictions or to invalidate a regional plan that does not reflect every aspect of every city plan within the region would defeat the clear purposes of the GMA.[22]

[20] 97 Wn. App. at 931.

[21] 97 Wn. App. at 934.

[22] 97 Wn. App. at 934-35.

City of Des Moines v. Puget Sound Regional Council, 98 Wn. App. 23, 988 P.2d 27 (Nov. 15, 1999), *review denied*, 140 Wn.2d 1027 (June 6, 2000) (*Des Moines II*).

Factual and Procedural Background

After the Puget Sound Regional Council (PSRC) amended the Regional Transportation Plan (RTP) for central Puget Sound to include planning for a third runway at Seattle-Tacoma International Airport, the Port of Seattle challenged the City of Des Moines' comprehensive plan in a petition to the Central Puget Sound Growth Management Hearings Board, alleging the City's plan precluded expansion of the airport, an essential public facility, in violation of RCW 36.70A.200(2). The Port also argued the City's plan was inconsistent with the RTP, King County's comprehensive plan, and the multi-county planning policies. The Board agreed: it found the entire Des Moines comprehensive plan violated RCW 36.70A.200 and it invalidated two policies it found in conflict with the RTP and the GMA's transportation goal, RCW 36.70A.020(3).

On remand from the Board, the City amended only the two invalidated policies. At the hearing after remand, the Board held the City's plan still did not comply with the GMA, reinstated its invalidity order, and recommended to the Governor that he impose sanctions if the City did not bring its plan into compliance. The City then amended its plan and the Board found it compliant. The City of Des Moines, together with other cities surrounding the airport, appealed the Board's decision to Superior Court, which upheld the Board and ruled that neither the GMA nor the procedural criteria adopted by the Department of Community, Trade, and Economic Development (CTED) required the Port to comply with the City's comprehensive plan.

The cities appealed.

The Court's Decision

The Court of Appeals affirmed.

A port district has a duty to comply with a local comprehensive plan that is consistent with the regional transportation plan. The cities argued WAC 365-195-770(2) requires the Port to comply with the City of Des Moines' comprehensive plans and development regulations. Referring to its analysis in *Des Moines I*, the Court held the Port was not required to comply with the City's comprehensive plan unless the City had engaged in the cooperative planning process required by the GMA and produced a plan reflecting that coordinated approach:

> [I]f a conflict between a city plan and an RTP exists after the planning process is completed, the city must revise its plan to comply with the regional plan. After consistency is achieved, the Port will have a duty to comply with both the RTP and the local plans, regardless of whether they require mitigation which the Port finds either difficult or expensive.[23]

Local governments may not preclude the expansion of an essential public facility. The cities argued that RCW 36.70A.200(2), which prevents local governments from precluding the siting of essential public facilities, does not apply to the expansion of existing essential public facilities. The Court rejected this argument, relying in part on CTED's procedural criteria and deferring to the Board's interpretation that the requirements of RCW 36.70A.200(2) apply to all essential public facilities, whether or not they were in existence prior to the GMA.

Local governments may not preclude off-site support activities necessary to the construction, expansion, or operation of an essential public facility. The cities also argued that RCW 36.70A.200(2) does not apply to necessary support activities that occur off-site. The Court rejected this argument as well, again relying on CTED's procedural criteria, including language in WAC 365-195-340(2)(c) that no comprehensive plan may "directly or indirectly" preclude the siting of an essential public facility. The Court held the legislative purpose of RCW 36.70A.200(2) would be defeated it local governments could prevent the construction or operation of an essential public facility: "if an activity is indeed "essential" to construction of an EPF, a local plan may not stop it from occurring."[24] The Court found the Port had demonstrated the supporting activities at issue were necessary for the airport expansion to occur.

The GMA's prohibition on "precluding" the siting or expansion of essential public facilities does not prevent local governments from imposing reasonable permitting and mitigation requirements. The Court upheld the Board's definition of "preclude" in RCW 36.70A.200. The Board had interpreted "preclude" to mean "incapable of being accomplished by the means at the Port's command." The fact that reasonable permitting and mitigation requirements would make construction more expensive did not preclude construction and did not relieve the Port of its obligation to comply with comprehensive plans that are consistent with the RTP.

New Castle Investments v. City of LaCenter, 98 Wn. App. 224, 989 P.2d 569 (Dec. 10, 1999), *review denied*, 140 Wn.2d 1019 (May 3, 2000).

This decision did not interpret the GMA, but it is included here because it involved issues that bear on local governments' implementation of the GMA.

Factual and Procedural Background

A developer applied to the City of LaCenter for preliminary plat approval two days before the City adopted its transportation impact fee (TIF) ordinance. The City Council reversed the hearing examiner's decision that the TIF ordinance did not apply to the proposed development, and the developer appealed to Superior Court. The Court reversed and the City appealed to the Court of Appeals.

[23] 98 Wn. App. at 31.

[24] 98 Wn. App. 34.

The Court's Decision

The Court of Appeals reversed the Superior Court.

Washington's subdivision vesting statute does not apply to transportation impact fees imposed under RCW 82.02. RCW 58.17.033 provides that a proposed subdivision of land vests to the land use control ordinances in effect at the time a fully completed application for preliminary plat approval of the subdivision has been submitted to the appropriate official. At issue was whether TIFs are "land use control ordinances." The Court of Appeals held they are not.

The Court characterized the dispute as one involving the timing of the fee's calculation:

> The Cities assert the calculation should be made when the building permit is issued; the Developers want it to occur at the time of the application. The Cities assert that TIFs are not land use control ordinances because the Legislature never intended the vesting statute to apply to TIFs and because, as a tax, TIFs do not fall within the definition of land use control ordinance. The Developers contend that TIFs are land use ordinances and are not taxes.[25]

Complicating the issue was the fact that TIFs were authorized by the GMA, which regulates land use, and TIFs apply only to land use.[26] The Court, however, held a TIF is not the type of right that vests under Washington's vested rights doctrine; a TIF does not limit use of land or resemble a zoning law; but only affects the ultimate cost of development. A TIF is a fee charged to new development, the purpose of which is to finance public facilities and system improvements, not to regulate development.

The Court also held it would be contrary to public policy to apply the vesting statute to TIFs:

> [T]o apply the vesting statute to TIFs would thwart the Legislature's intent that TIFs be "reasonably related to the new development that creates additional demand and need for public facilities, that is a proportionate share of the cost of the public facilities, and that is used for facilities that reasonably benefit the new development." RCW 82.02.090(3). These are perhaps the reasons the Legislature required TIFs to be tied to the local growth management plan, which evolves over time. RCW 82.02.050(4). The time lag between the application for preliminary plat approval and the issuance of the permit application may be many years. Thus, the fee calculated by LaCenter at the time of preliminary plat approval would bear little relationship to the actual impact of growth at the time the permit is issued.
>
> . . . To freeze the calculation of the impact fee at the time of application would disconnect planning and financing from the actual effects of growth. The Legislature has stated that the indirect effects of growth can be recovered. If the fee were frozen, then new growth could take place without the developer paying its fair share for improving public facilities. The developer could be paying an impact fee that reflects a planning effort and a cost that is no longer relevant. The TIFs must be calculated when the growth is to occur, at the time of the building permits; otherwise cities would be underfunded to pay for the indirect costs of new growth.[27]

[25] 98 Wn. App. at 228.

[26] The court of appeals found it significant that authority for TIFs, adopted as part of the GMA in 1990, was not placed in the RCW chapters governing land use control or development regulation, but instead was codified among excise taxes in Title 82 RCW. 98 Wn. App. at 235-36.

[27] 98 Wn. App. at 236-37 (footnote omitted).

APPELLATE DECISIONS IN 2000

Caswell v. Pierce County, 99 Wn. App. 194, 992 P.2d 534 (Jan. 31, 2000), *review denied*, 142 Wn.2d 1010 (Dec. 5, 2000).

This decision did not interpret the GMA, but it is included here because it involved issues that bear on local governments' implementation of the GMA.

Factual and Procedural Background

The owner of a mobile home park in rural Pierce County applied for a conditional use permit to expand. At the time of the application, the proposed development was allowed under the County's zoning ordinance, but lay outside a designated interim urban growth area (IUGA). The hearing examiner approved the conditional use permit, concluding the zoning ordinance took precedence over the County's interim growth management policies, including the IUGA ordinance.

Adjacent property owners appealed to Superior Court, which reversed, holding the hearing examiner failed to consider that the proposed development was contrary to Pierce County's IUGA ordinance and the GMA. Pierce County and the mobile home park owner appealed to the Court of Appeals.

The Court's Decision

The Court of Appeals reversed and remanded for reinstatement of the hearing examiner's decision.

A challenge to an IUGA ordinance may not be brought under the Land Use Petition Act but must be taken to a Growth Management Hearings Board. The adjacent property owners brought their appeal under the Land Use Petition Act (LUPA), RCW 36.70C. The Court of Appeals held the County's IUGA ordinance could not be challenged in a LUPA appeal, because LUPA, by its own terms, does not apply to decisions subject to review by a Growth Management Hearings Board.

The Court of Appeals then examined the County's IUGA ordinance to determine whether the County intended to prevent developments such as this in the rural zone. The Court concluded the County had intended to leave the rural zoning in effect during the interim period as part of its IUGA ordinance. The Court found the proposed development complied with the rural zoning and did not proceed to examine whether the proposed development was urban in character and thus precluded by the IUGA ordinance.

The Dissent

One judge dissented, arguing that the adjacent property owners' LUPA challenge was appropriate because they were challenging a permit, not the ordinances themselves. He also noted the hearing examiner had found the proposed development to be urban in nature, a finding which was unchallenged on appeal. Pointing out that an IUGA designation is itself a development regulation, the dissenting judge argued the IUGA ordinance should be viewed as an additional limitation supplementing the rural zoning restrictions.

Stewart v. Washington State Boundary Review Board, 100 Wn. App. 165, 996 P.2d 1087 (Feb. 28, 2000).

This decision did not interpret the GMA, but it is included here because it involved issues that bear on local governments' implementation of the GMA.

Factual and Procedural Background

Property owners petitioned the City of Auburn to annex their property, which lay within an urban growth area and an agricultural production district—i.e., it was designated as agricultural land of long-term commercial significance under RCW 36.70A.170. The City approved the annexation and notified the Boundary Review Board (BRB) for King County of its intent to annex. The BRB denied the annexation as premature because King

County and the City of Auburn had not entered into an interlocal agreement, as required under the county-wide planning policies and the County's comprehensive plan. The property owners appealed and the Superior Court affirmed the Board. The property owners then appealed to the Court of Appeals.

The Court's Decision

The Court of Appeals affirmed.

Boundary review boards are obligated to comply with the GMA and comprehensive plans adopted under the GMA; they may not reject a determination made in a final comprehensive plan. The Court of Appeals rejected the property owners' argument that the BRB erred by accepting the County's designation of their property as agricultural. The Court held the BRB is not empowered to decide that issue:

> Boundary review boards may not make land use decisions. Their powers are limited by the enabling statutes, and include the authority to review and approve, disapprove, or modify a proposed change in the boundary of any city. Those powers do not include rejection of a designation contained in a final county comprehensive plan. Instead, once statutory objective of boundary review boards is the protection of land designated agricultural in a comprehensive plan. Boundary review boards are also required by RCW 36.93.157 to make decisions consistent with specified sections of the GMA. The authority to review compliance with the GMA, on the other hand, is vested in the growth management hearings board (GMHB).
>
> . . . To ignore the comprehensive plan designation [as the property owners requested] would conflict with the BRB's statutory duties to make decision consistent with the purposes of the GMA and to protect designated agricultural land. To redesignate the land would exceed the BRB's powers. The BRB correctly declined to consider the question.[28]

The Court of Appeals refused the property owners' invitation to invalidate King County's interlocal agreement requirement, in large part because to do so would "avoid presentation of their arguments to the entity created by the legislature to decide them."[29] Rather, the arguments should be made first to the agency with expertise: the Growth Management Hearings Board.

Wells v. Western Washington Growth Management Hearings Board, 100 Wn. App. 657, 997 P.2d 405 (Apr. 10, 2000).

Factual and Procedural Background

As a result of a series of challenges before the Western Washington Growth Management Hearings Board, Whatcom County found itself subject to several determinations of noncompliance and invalidity regarding interim ordinances adopted to comply with the GMA. Rather than continue to revise its interim ordinances, the County proceeded to adopt its comprehensive plan and "associated development regulations." The Board found significant portions of the comprehensive plan and development regulations noncompliant and invalid.

The County and others appealed to Superior Court, which held the Board misinterpreted the GMA's "participation standing" provision, RCW 36.70A.280(2)(b), and failed to apply the presumption of validity to the County's comprehensive plan and development regulations.[30] CTED and others appealed to the Court of Appeals.

[28] 100 Wn. App. at 169-70.

[29] 100 Wn. App. at 177.

[30] For a variety of reasons, none of the petitioners before the Board participated in the appeal in superior court, and no party appeared to defend the substantive portions of the Board's decision. The Department of Community, Trade, and Economic Development (CTED) intervened to address legal issues.

The Court's Decision

The Court of Appeals affirmed.

A Growth Management Hearings Board may determine that portions of a new comprehensive plan and implementing development regulations were adopted in response to a prior determination of invalidity. The local government has the burden of demonstrating those portions do not substantially interfere with the fulfillment of the goals of the GMA. Comprehensive plans and development regulations are presumed valid when adopted. RCW 36.70A.320(1). A petitioner challenging a GMA plan or regulation has the burden of demonstrating noncompliance. RCW 36.70A.320(2). However, when a local government is subject to a determination of invalidity, the local government bears the burden of demonstrating the ordinance or resolution it adopted in response to the determination of invalidity "will no longer substantially interfere with the fulfillment of the goals of this chapter." RCW 36.70A.320(4).

The Court of Appeals rejected the County's argument that a newly adopted comprehensive plan could never be considered responsive to the prior determinations of invalidity and thus must always be presumed valid in its entirety. Rather, the Court held the Board may properly find that a local government adopted portions of its comprehensive plan and development regulations in response to an earlier determination of invalidity. Under RCW 36.70A.320(4), the burden then shifts to the local government as to those portions of the plan and regulations. All other portions of the plan and regulations are presumed valid and the burden is on the challengers to demonstrate invalidity. The challengers always have the burden of proving noncompliance.

A petitioner's participation before the local government need only have been "reasonably related" to the issues the petitioner brings before the Board. The Court of Appeals rejected the County's argument that a petitioner must raise a legal "issue" to the local government in order to raise that legal issue in a petition to the Board. The Court adopted the reasoning of the Central Puget Sound Growth Management Hearings Board:

> If a petitioner's participation [before the local government] is reasonably related to the petitioner's issue as presented to the Board, then the petitioner has standing to raise and argue that issue.[31]

The Court concluded this approach furthers the GMA's goals of encouraging meaningful public participation in the local government planning process and achieving local government compliance with the GMA:

> Persons who wish to raise issues before a growth management hearings board should participate actively in the planning process for the geographic areas or subjects of interest to them. The GMA assumes the local government will have an opportunity to address those concerns before an appeal to the growth management hearings board.[32]

The Boards have substantial discretion to determine whether a petitioner has "participation standing." The Court explicitly recognized that the Boards have considerable discretion to determine standing in each case:

> [I]t would be unrealistic given the time and resource constraint inherent in the planning process to require each individual petitioner to demonstrate to the growth management hearings board that he or she raised a specific legal issue before the board can consider it. The growth management hearings boards, with their expertise in these matters and their role as finders of fact, are best suited to decide whether, under the facts presented in a particular

[31] 100 Wn. App. at 673 (quoting *Alpine v. Kitsap County*, No. 98-3-0032c, Order on Dispositive Motions (October 7, 1998)). This holding by the Court was codified into RCW 36.70A.280 by the 2003 Legislature. *See* Laws of 2003, ch. 332.

[32] 100 Wn. App. at 674.

circumstance, a petitioner has established participation in a "matter."[33]

The time to appeal a Board's final order begins to run on each party when that party is served with a copy of the order. The Court of Appeals also addressed several procedural issues. Most notably, it held that under the Administrative Procedure Act, the time for an appeal to Superior Court begins to run for each party when that party is served with a copy of the final order by the Board. The appeal period is not delayed until all parties are served.

Wenatchee Sportsmen Association v. Chelan County, 141 Wn.2d 169, 4 P.3d 123 (July 20, 2000).

Factual and Procedural Background

A land company owned a large parcel eight miles from the City of Wenatchee, outside the interim urban growth area (IUGA) established by Chelan County. In 1996, the County rezoned the parcel to allow residential subdivisions. Shortly thereafter, the land company submitted a plat application for a residential subdivision. The County approved the application and issued a mitigated determination of nonsignificance (MDNS) under SEPA, concluding no environmental impact statement (EIS) was required for the project. The Wenatchee Sportsmen Association challenged the approval and the MDNS by filing a timely petition under the Land Use Petition Act (LUPA). The Superior Court reversed, holding the project complied with the rezone but not with the GMA's restrictions on urban growth outside the IUGA. The Superior Court did not address the MDNS.

The land company obtained direct review by the Supreme Court

The Court's Decision

The Supreme Court reversed the Superior Court.

The Court found the project approval was consistent with the 1996 rezone. At issue, then, was whether the project's compliance with the IUGA could be considered and whether the MDNS was properly issued. The Court held compliance with the IUGA had not been timely appealed. Having reversed the Superior Court on that issue, the Supreme Court remanded the MDNS to the Superior Court to determine whether the decision not to require an EIS was clearly erroneous.

Growth Management Hearings Boards have no jurisdiction to hear a petition alleging a site-specific rezone does not comply with the GMA. The Supreme Court rejected the land company's argument that the Association could not bring a LUPA challenge because it had not appealed the County's rezone first to the Growth Management Hearings Board. The Court held a site-specific rezone is not a development regulation under the GMA; the Board thus has no jurisdiction to hear a petition alleging it does not comply with the GMA.

A LUPA challenge to a site-specific rezone decision must be filed within 21 days of the decision. The Court agreed with the land company that the Association was barred from challenging the decision to rezone because it did not file its LUPA petition within 21 days after the rezone decision was made. On that basis, the Court concluded it was too late for the Association to argue that the rezone decision did not comply with the GMA. The only question for the Court to consider under the LUPA challenge as filed was whether the plat application complied with the applicable zoning ordinances.

The Court sidestepped the Association's argument that the rezone was only one of the applicable land use laws in effect. The Court recharacterized the argument as one asserting incompatible ordinances:

> [T]he issue of whether the RR-1 zoning allows for urban growth outside of an IUGA should have been raised in a timely LUPA challenge to the rezone, not in the later challenge to the plat. At that time a court reviewing the rezone decision could have considered whether

[33] 100 Wn. App. at 674.

the minimum density allowed by the RR-1 district was compatible with the IUGA. If there is no challenge to the decision, the decision is valid, the statutory bar against untimely petitions must be given effect, and the issue of whether the zoning ordinance is compatible with the IUGA is no longer reviewable.[34]

Association of Rural Residents v. Kitsap County, 141 Wn.2d 185, 4 P.3d 115 (July 20, 2000).

Factual and Procedural Background

A developer sought to develop a planned unit development (PUD) in rural Kitsap County, outside the designated interim urban growth area (IUGA). The County issued a mitigated determination of nonsignificance (MDNS) and approved the project. A citizens group appealed to the County Commissioners, who affirmed the MDNS and the project approval. The citizens then appealed to Superior Court, which reversed the Commissioners on several grounds.

The developer and the County appealed to the Court of Appeals. In a decision published at 95 Wn. App. 383, 974 P.2d 863, the Court of Appeals held the application vested to the zoning laws in effect at the time it was filed, including the County ordinance designating IUGAs. The Court of Appeals also held the designation of the IUGA could be an effective development regulation, even without local ordinances having been adopted to implement either the IUGA or the GMA's prohibitions on urban growth outside the IUGA.

The developer obtained review in the Supreme Court.

The Court's Decision

The Supreme Court reversed the Court of Appeals.

If a Growth Management Hearings Board finds a comprehensive plan provision or development regulation to be noncompliant with the GMA, the plan provision or regulation automatically becomes invalid at the end of the remand period unless the local government revises it to achieve compliance. As the Supreme Court noted, timing is important in this case. Kitsap County adopted an IUGA in October 1993. The citizens group petitioned the Central Puget Sound Growth Management Hearings Board for review. On June 3, 1994, the Board found the IUGA did not comply with the GMA and remanded for compliance by October 3, 1994. Rather than amending the IUGA, Kitsap County proceeded to adopt a comprehensive plan, which it did on December 29, 1994. The comprehensive plan contained final UGAs. In the interim, on December 15, 1994, the developer submitted a completed preliminary plat application and PUD proposal.

The Supreme Court held the IUGA was not in effect between October 3 and December 29, 1994, because the County did not act to bring it into compliance with the GMA. Rather, the former Kitsap County zoning ordinance, which had been supplanted by the IUGA, applied. The Court held a noncomplying regulation remains in effect only during the period of remand, to allow time for it to be amended. At the expiration of the remand period, it automatically becomes invalid if it has not been revised to come into compliance.

A preliminary plat application coupled with a PUD proposal creates a vested right to have the entire application, including the PUD, considered under the ordinances in effect at the time of filing. The Court agreed with the developer's argument that the PUD was not a rezone because it was permitted under the former Kitsap County zoning ordinance the Court revived between October 3 and December 29, 1994. The Court held the preliminary plat application filed together with the PUD proposal created a vested right to have the entire application, including the PUD, considered under the former Kitsap County zoning ordinance.

The Supreme Court remanded the remaining undecided issue, whether issuance of the MDNS was clearly erroneous.

[34] 141 Wn.2d at 181.

The Dissent

Justice Talmadge dissented, arguing that the majority did not treat the "crucial concern" in the case—the effect of the IUGA on development:

> The developers argue an IUGA is not a "development regulation" as that term is defined in the GMA. RCW 36.70A.030. Rather, their argument goes, a county must enact further, more specific ordinances to implement the IUGA, and the IUGA is therefore ineffective in and of itself to prevent growth outside its boundaries. The glaring flaw in this argument, however, is that the GMA itself describes an IUGA as a development regulation. RCW 36.70A.110(5). Aside from definitional niceties, there can be no question an interim urban growth boundary was to have the same controlling, regulatory effect as the permanent urban growth boundary, i.e., to prevent urban growth in rural areas.[35]

APPELLATE DECISIONS IN 2001

Faben Point Neighbors v. City of Mercer Island, 102 Wn. App. 775, 11 P.3d 322 (Aug. 28, 2000), *review denied*, 142 Wn.2d 1027 (Feb. 6, 2001).

Factual and Procedural Background

A developer proposed to subdivide a 2.1-acre parcel on the northern tip of Mercer Island into 6 lots. The City's zoning code required that lots must be at least 15,000 square feet, with minimum widths and depths. The City's critical areas ordinance (CAO), adopted under the GMA, required that each lot must have a 3,000-square-foot building pad. All of the lots satisfied the 15,000-square-foot requirement and the 3,000-square-foot building pad requirement, but four of the lots did not meet the width and depth requirement. The City approved the subdivision anyway and a neighborhood group filed a land use petition challenging the approval. The Superior Court reversed the City's approval and the developer appealed.

The Court's Decision

The Court of Appeals affirmed the Superior Court's reversal of the City's approval.

Zoning ordinances adopted before the GMA was enacted may be superseded by development regulations adopted under the GMA, but only if the GMA regulations actually conflict with the pre-GMA ordinance. Otherwise, the pre-GMA ordinance must be given effect alongside the GMA regulations. The City relied on a provision in the CAO that any conflict between the CAO and other zoning regulations would be resolved in favor of the CAO. The City found a conflict and determined the CAO superseded the width and depth requirement in the zoning code.

The developer argued on appeal that while there is no "logical" conflict between the CAO and the lot width and depth requirements, there is a "philosophical or policy" conflict. The developer reasoned as follows:

- The CAO was adopted pursuant to the GMA;
- Two of the GMA's policies are to encourage development in urban areas and to reduce sprawl;
- All of Mercer Island is within an Urban Growth Area (UGA), but most of the remaining lots are difficult to develop because of irregular shapes or terrain;
- The City cannot give effect to the zoning code's rigid dimension requirements and at the same time satisfy the GMA's goals encouraging urban development.

The Court of Appeals rejected the argument, finding no conflict between the dimension requirements and the CAO:

[35] 141 Wn.2d at 198-99.

> Were there ambiguity in the language of the enactments, or actual conflict with the GMA, we would surely investigate the underlying legislative intent. In the absence of ambiguity or conflict, however, . . . the words mean what they say.
>
> . . .
>
> If the City truly believes a conflict exists between its growth management objectives and its ordinances, then it can amend its development code. Until then, in the absence of an actual conflict, the two provisions should be read together.[36]

King County v. Central Puget Sound Growth Management Hearings Board, 142 Wn.2d 543, 14 P.3d 133 (Dec. 14, 2000).

Factual and Procedural Background

King County's 1994 comprehensive plan designated approximately 40,500 acres of agricultural lands of long-term commercial significance as agricultural production districts (APDs). In response to increasing demand for soccer fields and little league baseball fields, the County amended its comprehensive plan and development regulations in 1997 to allow "active recreational" uses on designated agricultural lands in the APDs. Several organizations representing agricultural interests challenged the 1997 amendments in a petition to the Central Puget Sound Growth Management Hearings Board.

In the proceedings before the Board, the County and the recreation supporters argued that the parcels at issue had not been used for agriculture for many years, that their use for recreation would buffer other agricultural lands from encroaching urban land uses, and that their use as athletic fields would preserve the agricultural soils for future agricultural use if and when reversion to agriculture was appropriate. The Board rejected the County's arguments and invalidated the amendments. The Board found that several provisions in the GMA, read together, created an "agricultural conservation imperative," which guided its interpretation of those provisions.

The County and its supporters appealed to Superior Court, which reversed the Board. The agricultural organizations obtained direct review by the Washington Supreme Court.

The Court's Decision

The Supreme Court, in an 8-1 decision, reinstated the Board's decision, including the Board's determination that the relevant provisions of the GMA evidence an "agricultural conservation imperative."

This case follows *City of Redmond v. Central Puget Sound Growth Management Hearings Board*, 136 Wn.2d 38, 959 P.2d 1091 (1998), the first appellate decision addressing the GMA's agricultural lands provisions. In *City of Redmond*, the Court adopted a broad interpretation of the definitions applicable to the GMA's agricultural lands provisions to implement the legislative intent that those lands be conserved.

In this case, the Court also construed the GMA's agricultural lands provisions to mandate meaningful conservation of designated agricultural lands.

The GMA's agricultural lands provisions impose a mandatory duty to designate and conserve agricultural lands of long-term commercial significance. The Court characterized this case as one of statutory construction and began its analysis by summarizing the GMA's agricultural lands provisions (RCW 36.70A.020(8), .060, and .170) and recreation provisions (RCW 36.70A.020(9), .150, and .160). Acknowledging that the GMA's planning goals are not listed in any priority order, the Court nevertheless found the mandatory character of the agricultural lands provisions imposes "a duty to designate and conserve agricultural lands to assure the maintenance and enhancement of the

[36] 102 Wn. App. at 781-82.

agricultural industry."[37] In contrast, the recreational provisions merely "encourage" the designation of recreational uses. On this analysis, the Court held King County's interpretation of the GMA (to allow active recreation on agricultural lands) would "result in a net loss of designated agricultural land," contrary to the " Legislature's stated intent to conserve such land in order to maintain and enhance the agricultural industry."[38]

Although a county may use "innovative zoning techniques" to conserve agricultural lands, the use of such techniques must satisfy the GMA's mandate to maintain and enhance the agricultural industry. The County argued its amendments were allowed under RCW 36.70A.177, a 1997 amendment allowing local governments to use "innovative zoning techniques" to conserve agricultural lands. The Court disagreed, finding King County and the Superior Court had misplaced the discretion allowed under RCW 36.70A.177:

> In order to constitute an innovative zoning technique consistent with the overall meaning of the Act, a development regulation must satisfy the Act's mandate to conserve agricultural lands for the maintenance and enhancement of the agricultural industry.
>
> The trial court erroneously found that the County's amendments qualified as an "innovative zoning technique" under RCW 36.70A.177. The statute encourages counties to limit innovative techniques "to lands with poor soils or otherwise not suitable for agricultural purposes." . . . Read logically, this phrase means that the County *may* encourage nonagricultural uses where the soils are poor or the land is unsuitable for agriculture. It should not be read that the County may encourage nonagricultural uses *whether or not* the soils are poor or unsuitable for agriculture. The evidence does not support a finding that the subject properties have poor soils or are otherwise not suitable for agricultural purposes. Therefore, the properties in this case do not qualify for "innovative zoning techniques."
>
> . . .
>
> The County has broad discretion to develop a comprehensive plan and development regulations that are suited to its local circumstances. However, the County's proposed action to convert agricultural land to active recreation does not appear in any of the Act's suggested zoning techniques. After properly designating agricultural lands in the APD, the County may not then undermine the Act's agricultural conservation mandate by adopting "innovative" amendments that allow the conversion of entire parcels of prime agricultural soils to an unrelated use. The explicit purpose of RCW 36.70A.177 is to provide for creative alternatives that *conserve* agricultural lands and *maintain* and *enhance* the agricultural industry.[39]

The Court explicitly affirmed the Board's determinations that RCW 36.70A.020(8), .060(1), and .170, when read together, evidence a legislative mandate for the conservation of agricultural land, and that RCW 36.70A.177 must be interpreted to harmonize with that mandate. Nothing in the GMA permits recreational facilities to supplant agricultural uses on designated lands with prime soils for agriculture. Although the GMA encourages recreational uses of land, there is no conservation mandate for recreational use, as there is for agricultural use.

Local government's discretion in implementing the GMA is bounded by the goals and requirements of the GMA. The Court acknowledged that local governments have broad discretion in developing comprehensive plans and development regulations tailored to

[37] 142 Wn.2d at 558.

[38] 142 Wn.2d at 558-59.

[39] 142 Wn.2d at 560-61 (emphasis by the Court).

local circumstances. Interpreting RCW 36.70A.3201, the Court explained that local discretion is bounded by the goals and requirements of the GMA: while the Growth Management Hearings Boards are to give deference to counties and cities in how they plan for growth, the Boards nevertheless are obligated to review local governments' exercise of discretion for consistency with the goals and requirements of the GMA.

Moore v. Whitman County, 143 Wn.2d 96, 18 P.3d 566 (Feb. 22, 2001).

Factual and Procedural Background

In two petitions to the Eastern Washington Growth Management Hearings Board, the Moores challenged Whitman County's critical areas ordinances (CAOs). The County had exempted all agricultural lands from the CAOs unless and until agricultural use of a parcel changed. Ultimately, after the County amended the CAOs slightly, the Board found the CAOs complied with the GMA. The Moores obtained judicial review of the Board's decision and the Superior Court reversed the Board. On appeal, the Court of Appeals certified the case to the Supreme Court, which accepted review.

The Court's Decision

The Supreme Court reversed the Superior Court's decision and dismissed the Moores' challenge.

The Growth Management Hearings Boards lack jurisdiction to hear petitions for review arising in counties that do not plan under RCW 36.70A.040. The County, pointing to RCW 36.70A.250, argued that the Eastern Board has jurisdiction to hear only petitions arising in counties planning under RCW 36.70A.040. The Moores and others responded that RCW 36.70A.250 should be read together with all the enforcement sections of the GMA, and in that context should be read more as a venue statute, dividing the counties and cities in the state into three regions to provide regional sensitivity in administrative review of local compliance with the GMA.

The Supreme Court held RCW 36.70A.250 limits the jurisdiction of the Eastern Board to counties located east of the Cascade Mountains that are required to or choose to plan under RCW 36.70A.040. Finding Whitman County does not plan under RCW 36.70A.040, the Court held the Board had no jurisdiction to hear the Moores' appeal and dismissed the action.

The Court's explanation of its holding makes it clear that the Western Washington Growth Management Hearings Board's jurisdiction similarly is limited only to petitions arising in counties planning under RCW 36.70A.040.

Challenges to GMA compliance arising in counties that do not plan under RCW 36.70A.040 are to be heard in Superior Court. The Supreme Court explained that the Courts serve as the "traditional, if not preferred, forum" for resolving land use disputes and suggested in dictum that a challenge to GMA compliance arising in a "non-planning" county could be heard under the Land Use Petition Act or RCW 36.70A.295.

Ahmann-Yamane, LLC v. Tabler, 105 Wn. App. 103, 19 P.3d 436 (Mar. 1, 2001) (amended Apr. 3, 2001), *review denied*, 144 Wn.2d 1011 (Sept. 5, 2001).

This decision is not a GMA case, but it is included here because the Court addressed the use of the GMA and an interim urban growth area (IUGA) as standards for land use approval or denial.

Factual and Procedural Background

This was a legal malpractice case against Mr. Tabler resulting from his improper filing of an appeal of a rezoning application that was denied. As part of its analysis, the Court of Appeals had to determine whether the attorney's negligence caused harm to Ahmann-Yamane.

Ahmann-Yamane owned some 165 acres of agricultural land northwest of Moses Lake in Grant County. The land was outside the IUGA established by the County under the GMA. In

1998, Ahmann-Yamane filed an application to have the land rezoned to allow subdivision into 1- to 3-acre residential lots. The Board of County Commissioners ultimately denied the application.

On appeal, Ahmann-Yamane argued that the County's denial of its rezone application would have been reversed by the Superior Court if it had been filed properly.

The Court's Decision

The Court of Appeals disagreed, addressing an interesting pair of arguments based on *Association of Rural Residents v. Kitsap County*, 95 Wn. App. 383, 974 P.2d 863 (1999), *aff'd in part, rev'd in part*, 141 Wn.2d 185, 4 P.3d 115 (2000). In *Rural Residents*, the Court of Appeals held Kitsap County violated the GMA by approving a planned unit development because it allowed urban development to occur outside the County's IUGA. Mr. Tabler argued that the facts of this case were indistinguishable from those in *Rural Residents* so that the rezone could not be approved without violating the GMA. Mr. Tabler therefore maintained no harm had resulted from his error because the rezone could not have been granted. Ahmann-Yamane replied that the Supreme Court had reversed this holding in *Rural Residents*.

A local government should apply the goals and requirements of the GMA and its own comprehensive plan provisions and development regulations when considering land use applications. The Court of Appeals rejected Ahmann-Yamane's characterization of the Supreme Court's decision in *Rural Residents*:

> The Court of Appeals decision was reversed because the development application vested to the zoning laws in effect when the application was filed, and because the IUGA was not in effect at that time, the former land use ordinance should have been applied. . . . The Supreme Court did not, however, hold that the GMA and the IUGA are improper standards for land use approval or denial. . . .[40]

The Court of Appeals concluded Grant County had properly applied the goals of the GMA, the elements of its comprehensive plan, and the coverage of its IUGA in denying the application.

Citizens for Responsible and Organized Planning (CROP) v. Chelan County, 105 Wn. App. 753, 21 P.3d 304 (Apr. 10, 2001).

Factual and Procedural Background

In 1994, landowners applied to Chelan County to plat a residential subdivision in the Wenatchee Heights area, which is outside the County's IUGA boundary. The Planning Commission recommended denial, but the Board of County Commissioners approved it on the ground that it was bound by previous Commissioners' decisions approving similar subdivisions. CROP appealed to Superior Court, which reversed and remanded. The Commissioners again approved the subdivision. CROP again appealed, and this time the Superior Court affirmed.

The Court's Decision

The Court of Appeals reversed the Superior Court.

CROP argued on appeal that the subdivision constituted urban growth outside the IUGA, which was prohibited under the GMA and under Chelan County Resolution 93-122, which designated interim urban growth boundaries. The landowners responded that their proposed subdivision was not urban growth because it was consistent with other subdivisions previously approved under Resolution 93-122.

The Court of Appeals did not decide whether the proposed subdivision was urban growth. Instead, the Court held the Commissioners' approval was not supported by substantial evidence.

[40] 105 Wn. App. at 115.

The Court found the Commissioners had never determined whether the proposed subdivision was urban, and the Court held that determination was required for compliance with the GMA and with Resolution 93-122:

> The Board [of Commissioners] concluded that the Matthewses' proposed lot sizes were consistent with other subdivisions previously approved outside the IUGA. But legally the response is – so what? The question is whether the Matthewses' subdivision is urban. Not, have we done this before?[41]

The vested rights doctrine does not require a local government to approve a land use application solely because other similar applications have been improperly approved under the applicable laws. The Court characterized the landowners' argument as a misapplication of the vested rights doctrine. They were entitled to application of the laws at the time they filed their subdivision application—i.e., to application of the GMA as it existed in 1994 and to Chelan County Resolution 93-122—but they were not entitled to have their subdivision application automatically approved simply because other similar subdivisions had been approved under the same laws.

A resolution adopted under the GMA must be read together with the GMA when challenged as unconstitutionally vague. The Court rejected the landowners' argument that Resolution 93-122 was unconstitutionally vague. The Court held the resolution must be read in conjunction with the GMA and its policies, definitions, and requirements in RCW 36.70A.020, .030, and .110. When so read, the resolution was not unconstitutionally vague.

Somers v. Snohomish County, 105 Wn. App. 937, 21 P.3d 1165 (Apr. 23, 2001).

Factual and Procedural Background

Snohomish County adopted an ordinance establishing the Monroe Interim Urban Growth Area (IUGA) in October 1993. In August 1994, a developer applied for preliminary plat approval of a subdivision lying outside the IUGA. The pre-GMA zoning of the area permitted minimum lot sizes of 20,000 square feet. The hearing examiner found no guidance in the IUGA ordinance or elsewhere in the County Code as to what land use densities were permissible outside the IUGA; he also found the GMA's definition of urban growth to be "quite subjective." He therefore approved the application, and the County Council affirmed it in January 1997. Neighbors appealed the approval in a LUPA petition.

The Superior Court held the IUGA was a self-executing land use regulation prohibiting urban growth outside its boundaries, for which additional implementing regulations were not needed for it to be effective.

The Court's Decision

The Court of Appeals reversed.

A LUPA complaint that even suggests noncompliance with the GMA may be dismissed for lack of subject matter jurisdiction. The Court of Appeals held the Superior Court lacked subject matter jurisdiction under LUPA to hear the appeal of the County's decision. The neighbors had filed a LUPA petition to challenge the County's approval of the subdivision; they did not challenge the Monroe IUGA or the pre-GMA zoning. But the developer and the County argued the neighbors were collaterally challenging the pre-GMA zoning "to the extent that it permits 'urban density' outside the Monroe IUGA, thereby raising GMA compliance issues that are beyond the proper scope of a LUPA appeal."[42] The Court of Appeals, relying on a single sentence in one paragraph of the neighbors' complaint and

[41] 105 Wn. App. at 760.

[42] 105 Wn. App. at 943.

on subsequent questioning during oral argument, held the neighbors' "real argument is that the County failed to comply with the GMA when it applied a pre-existing ordinance that permitted urban densities outside of the IUGA,"[43] a question of GMA compliance over which the Growth Management Hearings Boards have exclusive jurisdiction.

A LUPA petition that does not allege a conflict with the underlying comprehensive plan or zoning may be dismissed for lack of subject matter jurisdiction. The neighbors argued the Central Puget Sound Growth Management Hearings Board could not hear this challenge under *Citizens for Mount Vernon v. City of Mount Vernon*, 133 Wn.2d 861, 947 P.2d 1208 (1997), in which the Supreme Court held the Boards cannot render a decision on a specific development project. The Court of Appeals held Mount Vernon did not control because it involved an alleged conflict with the underlying zoning, while the neighbors' challenge in this appeal did not allege any conflict with the underlying zoning. In its analysis, the Court of Appeals implicitly treated the IUGA simply as a requirement of the GMA, not as a development regulation the County had adopted.

Pre-GMA zoning that does not comply with the GMA may be challenged in a petition to a Growth Management Hearings Board as a failure-to-act claim. The Court of Appeals interpreted the Supreme Court's decision in *Skagit Surveyors and Engineers, LLC v. Friends of Skagit County*, 135 Wn.2d 542, 958 P.2d 962 (1998), to allow the neighbors to have appealed the pre-GMA zoning through a failure-to-act claim. In other words, the neighbors should have alleged the County was in noncompliance with the GMA because it had not taken action to adopt development regulations specifying limits on urban growth in the rural area and instead was continuing to enforce its pre-GMA zoning.

Unless a local government explicitly provides notice that it will retain pre-GMA zoning, there may be no time limit as to when a failure-to-act claim may be filed. The Court of Appeals did not accept the County's argument that the 60-day period for filing a failure-to-act claim began to run on the date the Monroe IUGA was adopted. Finding the record was unclear as to whether the County in fact made any specific decision to retain the pre-GMA zoning when it adopted the Monroe IUGA, the Court held "there is a question as to whether the proper statute of limitations begins to run in the absence of notice of such action by the County."[44] The Court continued:

> To the extent that the County's argument has validity, this is a potential trap for the unwary. All should be on notice that, once a county draws its IUGA, zoning outside the boundary that conflicts in any way with the GMA may be appealable to the appropriate GMHB. That may be the case even without a specific project to trigger the inquiry, as in this case.[45]

The decision is consistent with *Association of Rural Residents v. Kitsap County*, 141 Wn.2d 185, 4 P.3d 115 (2000), and *Caswell v. Pierce County*, 99 Wn. App. 194, 992 P.2d 534, *review denied*, 142 Wn.2d 1010, 16 P.3d 1265 (2000). All three decisions treat the IUGA boundary not as a development regulation, but as some arbitrary line that is of no consequence unless rural zoning is changed as well.[46]

[43] 105 Wn. App. at 945.

[44] 105 Wn. App. at 949.

[45] 105 Wn. App. at 949. Following this decision, petitioners attempting LUPA challenges must be very careful in crafting their petitions. Any claim in a petition that can be construed as a challenge to the underlying development regulation may be enough to cause their petition to be dismissed. Impliedly, however, the reverse may also be true: if a GMA petition for review of a local legislative act includes an allegation against a particular project (even if the particular project application triggered the challenge to the ordinance or resolution), that allegation may be enough for a reviewing court to conclude the matter should have been brought as a LUPA appeal. The "trap for the unwary" the Court described may open both ways.

[46] These courts have either not accepted or not understood the GMA's conception that the IUGA was intended to constrain urban sprawl while a county finished its comprehensive planning.

Sammamish Community Council v. City of Bellevue, 108 Wn. App. 46, 29 P.3d 728 (Aug. 20, 2001), *review denied*, 145 Wn.2d 1037 (Apr. 2, 2002).

Factual and Procedural Background

The GMA requires cities planning under RCW 36.70A.040 to include in their comprehensive plans a transportation element that specifies level of service (LOS) standards for local streets and roads. RCW 36.70A.070(6)(a)(iii)(B). New development is prohibited if it would cause the LOS at relevant intersections to drop below adopted LOS standards "unless transportation improvements or strategies to accommodate the impacts of development are made concurrent with the development." RCW 36.70A.070(6)(b). This prohibition is referred to as the GMA's "transportation concurrency requirement." The City of Bellevue implemented these requirements in its comprehensive plan and Traffic Standards Code (TSC).

Under RCW 35.14.040, the Sammamish Community Council and East Bellevue Community Council may "disapprove" a comprehensive plan or zoning ordinance adopted by the City of Bellevue. "Disapproval by the community council shall not affect the application of any ordinance or resolution affecting areas outside the community municipal corporation." RCW 35.14.040.

In 1998, the City of Bellevue amended its TSC to adopt new methodology for calculating traffic volume and traffic capacity, based on the recommendation of a transportation task force. Both Community Councils objected to the new methodology, arguing it would allow more traffic in their neighborhoods without violating LOS standards, thus circumventing the GMA's transportation concurrency requirement. Purporting to exercise their disapproval authority under RCW 35.14.040, both Councils disapproved the amendment to the TSC.

Two actions followed in Superior Court.

In the first action, the Councils raised two claims: (1) that the new methodology effectively modified LOS standards and therefore should have been adopted as a comprehensive plan amendment; and (2) that their disapproval authority extended to the TSC because it was a zoning ordinance applying to land, buildings, or structures. The Superior Court dismissed the first claim and ruled for the Councils on the second claim.

Following that ruling, the Councils contended their disapproval required the City to disregard its new methodology when applying its TSC to proposed new development anywhere in the City that might impact traffic in intersections within the Councils' jurisdiction. In response to this contention, the City filed an action in Superior Court seeking declaratory judgment that the Councils' disapproval affected only proposed development within the Councils' respective jurisdiction. Again the Superior Court found for the Councils.

The Court's Decision

The Court of Appeals affirmed in part and reversed in part.

The GMA's transportation concurrency requirement does not transform an ordinance regulating the calculation of traffic volume and capacity into a zoning ordinance. The Court first determined the TSC was not a "zoning ordinance," for three reasons: (1) it "does not control property improvements or regulate design of buildings or the character of use to which property may be built"[47]; (2) even though the TSC divided the City into geographic zones, "an ordinance is not necessarily a zoning ordinance simply because it divides property"[48] if it does not regulate the use of land, buildings, and structures within those zones; and (3) "[t]he GMA's requirement that the City prohibit development if LOS at intersections drops below applicable standards without mitigation does not transform [the ordinance adopting new methodology] into a zoning ordinance."

Finding the TSC was not a zoning ordinance, the Court held the Councils were not authorized under RCW 34.15.040 to disapprove the amendment to the TSC. The Court of

[47] 108 Wn. App. at 53.

[48] 108 Wn. App. at 54.

Appeals reversed the Superior Court on this issue.

Next, the Court affirmed the Superior Court's dismissal of the Councils' claim that the new methodology effectively amended the comprehensive plan by changing the LOS standards.

Finally, the Court held that even if the Councils' disapproval authority extended to the TSC amendment, their disapproval would not affect how the City applies the TSC to proposed land use development projects outside the Councils' jurisdictional boundaries. The Court of Appeals reversed the Superior Court on this issue.

Moss v. City of Bellingham, 109 Wn. App. 6, 31 P.3d 703 (Sept. 17, 2001), *review denied*, 146 Wn.2d 1017 (July 1, 2002).

Factual and Procedural Background

The City of Bellingham approved a preliminary plat approval for a large subdivision, issued after a Determination of Nonsignificance (DNS) under SEPA. A group of citizens filed a LUPA petition challenging the approval, arguing a full environmental impact statement (EIS) should have been prepared. The developer responded that 1995 legislation integrating SEPA project review with the GMA allowed the City's planners to rely on existing laws and regulations, and to mitigate the adverse impacts of the project in order to bring it below the threshold for EIS preparation.

The Superior Court held for the City.

The Court's Decision

The Court of Appeals affirmed.

When reviewing the environmental impacts of a proposed project and making a threshold determination under SEPA, a local government may rely on environmental analysis and mitigation integrated into its comprehensive plan and development regulations. In 1995, as part of regulatory reform, the Legislature passed the "Integration of Growth Management Planning and Environmental Review Act" (ESHB 1724, 1995 Laws, ch. 347). The Court described the addition of RCW 43.21C.240 to SEPA, as implemented in WAC 197-11, as "substantially streamlin[ing] the threshold determination process for cities and counties planning under the GMA by authorizing the SEPA official to rely on existing plans, laws and regulations in meeting SEPA requirements."[49] The Court also referred to language in RCW 36.70B.030, providing that "fundamental land use planning choices made in adopted comprehensive plans and development regulations shall serve as the foundation for project review" and authorizing local governments to "determine that the requirements for environmental analysis and mitigation measures in development regulations and other applicable laws provide adequate mitigation for some or all of the project's specific adverse environmental impacts to which the requirements apply."[50]

A local government may use existing comprehensive plans and development regulations for the analysis and mitigation of a project's environmental impacts, filling in the gaps as needed by imposing mitigation requirements under SEPA. Much of the Court's analysis focused on the SEPA rules adopted or amended in response to the 1995 legislation. Central to the Court's analysis was WAC 197-11-158(1), which authorizes GMA counties or cities to determine that the requirements for environmental analysis, protection and mitigation in its development regulations, comprehensive plan, and other applicable laws or rules provide adequate analysis of and mitigation for some or all of the project's adverse impacts. The Court rejected the citizens' argument that WAC 197-11-158 applies only where *all* impacts can be addressed by existing plans and rules:

[49] 109 Wn. App. at 16. The 2003 Legislature amended SEPA to allow SEPA exemptions for urban infill in urban growth areas where the comprehensive plan was subject to an environmental impact statement under SEPA. *See* Laws of 2003, ch. 298.

[50] 109 Wn. App. at 17-18.

> WAC 197-11-158 creates a flexible process whereby SEPA officials are authorized to rely as much as possible on existing plans, rules and regulations, filling in the gaps where needed by imposing mitigation measures under SEPA. It is not an all-or-nothing proposition, as characterized by appellants.[51]

In dictum, the Court of Appeals rejected the Superior Court's suggestion that an EIS would be required only for a completely different land use from that discussed in the comprehensive plan:

> [M]ore than mere consistency with the comprehensive plan and development regulations is required to avoid EIS preparation. WAC 197-11-158 and WAC 197-11-350 also require that the specific adverse environmental impacts of the project be adequately mitigated.[52]

This language is dictum since the citizens did not allege the subdivision was inconsistent with the comprehensive plan and development regulations.

APPELLATE DECISIONS IN 2002

Department Of Ecology v. Campbell & Gwinn, L.L.C., 146 Wn.2d 1, 43 P.3d 4 (Mar. 28, 2002).

This decision did not interpret the GMA, but it is included here because it affects the availability of water for development.

RCW 19.27.097(1) generally requires each applicant for a building permit to provide evidence of an adequate water supply for the intended use of the building. Prior to this decision, some counties and cities planned for future development assuming the 5000 gallons per day (gpd) limit in RCW 90.44.050 did not apply to a group of wells constructed as part of a single development. Those counties and cities may need to revise their capital facility planning provisions and/or development regulations to account the effects of this decision.

Factual and Procedural Background

In 1999, a developer purchased 20 lots in the Yakima River Basin and decided to construct individual wells on each lot, believing it could do so without obtaining a permit from Ecology under RCW 90.44. Ecology determined the permit exemption in RCW 90.40.050 for groundwater withdrawals for domestic uses of 5,000 gpd or less did not apply to a group of wells constructed as part of a single development where, as here, withdrawal from the wells would exceed 5,000 gpd. Ecology sought a declaration confirming its interpretation of RCW 90.44.050 in Superior Court, but the Court ruled for the developer. Ecology appealed and obtained direct review in the Supreme Court.

The Court's Decision

The Supreme Court agreed with Ecology and held ***the 5,000 gpd limit RCW 90.44.050 applies to groups uses as well as single uses***, so that the developer was entitled only to a single exemption. The Court also held the permit must be acquired before any well is dug and before any water is put to beneficial use.

The Dissents

Justice Owens, joined by Justices Bridge and Johnson, dissented, arguing the majority decision "tolls the bell for growth and growth management in rural Washington." They maintained the exemption is necessary to promote sensible growth because large water supply installations often are not feasible in rural areas. In a footnote, the majority rejected that characterization: acknowledging that water allocation decisions affect patterns and extent of community growth, the majority explained it is the job of the Legislature, not the courts, to change water resource management policy and law.

[51] 109 Wn. App. at 22.

[52] 109 Wn. App. at 26.

Montlake Community Club v. Central Puget Sound Growth Management Hearings Board, 110 Wn. App. 731, 43 P.3d 57 (Apr. 1, 2002).

Factual and Procedural Background

In 1994, the City of Seattle adopted its comprehensive plan under the GMA. The plan designated five "urban village" areas planned for high density, including the University Community Urban Center. The City initiated a subarea planning process for the Urban Center. Although the Montlake neighborhood lies outside the Urban Center, concerns about associated traffic congestion in the Montlake area prompted members of the Montlake Community Club to participate in the subarea planning process. They asked the City to study traffic impacts at eight specific intersections. The City did so, using the same "screenline" methodology it used in the 1994 comprehensive plan.

Rather than determining a traffic volume-to-capacity ratio for individual intersections and roadway segments, screenline methodology takes a broader approach, which includes shifting traffic to alternative routes and measures to reduce travel demand. The screenline is a relative measure of traffic flow, rather than a fixed number of vehicles that cannot be exceeded. Accordingly, the capacity of some intersections could be exceeded without the screenline being exceeded. On that basis, when the subarea plan was adopted in 1998, the Club challenged the plan and the screenline methodology, asserting they violated the transportation and concurrency requirements of the GMA.

The Board's Decision

A traffic-planning methodology adopted in the comprehensive plan that is not challenged (or that is challenged and upheld) when the comprehensive plan is adopted may not be challenged later when the methodology is implemented. The Board ruled the Club's transportation and concurrency arguments were untimely: the time to have challenged the screenline methodology was five years earlier when the City adopted its comprehensive plan. The Board noted it had reviewed and upheld the screenline methodology in *West Seattle Defense Fund v. City of Seattle*, CPSGMHB No. 94-3-0016, Final Decision and Order (Apr. 4, 1995). The Board found the subarea plan was consistent with the comprehensive plan, as required in RCW 36.70A.080, and it did not amend the methodology adopted in the comprehensive plan, which would have started a new 60-day clock for challenging the methodology.

The Courts' Decisions

The Superior Court and the Court of Appeals both affirmed the Board's dismissal of the Club's petition for review as untimely.

1515–1519 Lakeview Boulevard Condominium Association v. Apartment Sales Corporation, 146 Wn.2d 194, 43 P.3d 1233 (Apr. 18, 2002).

This decision did not interpret the GMA, but it is included here because it illustrates issues arising from development on marginal lots as cities attempt to allow for increased urban density in cities to meet GMA goals.

Factual and Procedural Background

A developer built three condominiums on a lot that consisted of a narrow flat area which dropped down a steep slope to Interstate 5. When the lot was proposed for construction, the City of Seattle was concerned about potential landslides and imposed several conditions on the developer, including a covenant exculpating the City from liability for damages caused by soil movement.

The homeowners were assured repeatedly by the developer that the site was stable and the condominiums would not slip even if the slope moved. Nevertheless, during heavy rains in the winter of 1996-97, soil movement made the condominiums uninhabitable. The homeowners sued the developer, the City, and others for damages.

The Court's Decision

One issue considered by the Supreme Court was whether the exculpatory covenant recorded in the deeds ran with the land, thereby releasing the City from the homeowners' claim that the City negligently granted the permit to build on the site. The City argued innovative land use instruments, like the exculpatory covenant, should be encouraged as the GMA channels development onto more marginal lots in urban areas. Because the City was concerned about possible regulatory takings claims or inverse condemnation actions if it denied building permits on marginal lots, it suggested property owners of marginal land should be free to propose creative solutions and accept the risks of development.

The Supreme Court agreed with the City and held the City was not liable for negligently granting a permit to build on the site, and the exculpatory covenant released the City from liability for soil movement resulting from having issued the permit. The Court remanded to allow the homeowners to pursue claims against the City alleging soil movement caused by negligent maintenance of storm and water drains.

Manke Lumber Company, Inc. v. Central Puget Sound Growth Management Hearings Board, 113 Wn. App. 615, 53 P.3d 1011 (May 17, 2002), *review denied*, 148 Wn.2d 1017 (Mar. 4, 2003).

Factual and Procedural Background

This appeal followed Kitsap County's third (and ultimately successful) attempt to adopt a comprehensive plan that complied with the GMA. Numerous challenges to the third comprehensive plan were resolved by the Central Puget Sound Growth Management Hearings Board, including those of Manke Lumber Company, which alleged the County's designation of its shoreline properties as interim rural forest lands were arbitrary and without substantial evidence in the record, and Warren Posten, who challenged Keyport's removal from designation as an urban growth area. The Superior Court dismissed Manke's and Posten's appeals of the Board's decision. They appealed to the Court of Appeals.

The Court's Decision

The Court of Appeals affirmed the Board.

The GMA does not require local governments to devise the "best" comprehensive plan, but rather a plan that complies with the GMA and that is suitable for that local government. The Court held Manke had not rebutted the presumption of validity afforded the comprehensive plan, development regulations, and amendments adopted under the GMA. The Court explained the GMA does not require a local government to use any particular method to develop the rural element of its comprehensive plan, so long as the plan is guided by the GMA's goals and tailored to local conditions. The GMA allows local governments wide discretion in developing their plans because they must abide by those plans.

The Court held the County acted within its discretion in determining not to designated Keyport as a UGA, and it rejected Posten's argument he was entitled to personal notice of the County's legislative land use decision. The Court found Posten had actual notice and effectively participated in the County's public process.

Holbrook, Inc. v. Clark County, 112 Wn. App. 354, 49 P.3d 142 (June 28, 2002), *review denied*, 148 Wn.2d 1017 (Mar. 4, 2003).

Factual and Procedural Background

Holbrook purchased 75 acres of forested land in Clark County, intending to log it and then subdivide it into 5-acre lots for development. Under County ordinances then in effect, Holbrook could have divided the property into 5-acre parcels without further County approval.

At the time of Holbrook's purchase, the County was in the process of developing its comprehensive plan under the GMA. By the

time Holbrook bought the property, County staff had drafted a community framework plan that proposed Holbrook's property and other lands for designation as rural or forest resource land. The County adopted the plan in 1993.

Before adopting its comprehensive plan, the County held numerous public meetings, including three devoted specifically to proposed natural resource lands designations. At these meetings, several property owners succeeded in having their properties removed from resource designation. In 1994, the County adopted its final comprehensive plan, which designated 55 acres of Holbrook's property as forest resource land allowing one residential lot per 40 acres.

Throughout its planning process, the County used numerous methods of outreach and notice, including mailings, newsletters, news releases, a telephone hotline, a speakers' bureau, public workshops, fairs and open houses, print and television advertisements, and legal notices in newspapers. Mailed notices and newsletters were sent to all Clark County residents, and legal notices were placed in the local newspapers. However, the County never gave Holbrook individual notice of its actions, although it had Holbrook's Olympia address from assessor's records.

Holbrook learned several months later that its land had been designated. Its request to re-designate its property for development was denied. Holbrook then sued the County for declaratory relief and damages under 42 U.S.C. § 1983, claiming the County violated Holbrook's statutory and constitutional rights by down-zoning its property without adequate notice. The Superior Court held Holbrook was not denied constitutionally or statutorily required notice or equal protection of law. Holbrook appealed.

The Court's Decision

The Court of Appeals affirmed.

The GMA does not require counties and cities to provide individual notice to landowners of actions taken under the GMA. The Court of Appeals rejected Holbrook's arguments that individual notice to landowners is required by RCW 36.70A.035 or WAC 365-190-040. The Court also noted a 1992 Attorney General Opinion concluding neither the GMA nor the planning enabling statutes require individual notice to every landowner whose property may be affected negatively by adoption of a comprehensive plan or development regulations.

Due process does not require counties and cities to provide individual notice to landowners of actions taken under the GMA. The Court also rejected Holbrook's argument that individual notice is required by Article I, Section 12, of the Washington Constitution. Agreeing with the Superior Court that the area-wide zoning and comprehensive plan amendments at issue here were legislative, the Court of Appeals explained that constitutional due process rights do not attach to purely legislative acts. When the challenge is to a legislative enactment, the legislative process provides all the process that is due.

The Court suggested legislative decisions can give rise to individual constitutional due process protections where one person, or relatively few people, are exceptionally affected by a decision on individual grounds, but the Court held that was not the circumstance here. Holbrook was not entitled to individual notice on that basis.

Equal protection does not require a county or city to send public notices of action taken under the GMA to landowners who live outside the jurisdiction. The Court also held the County did not deprive Holbrook of equal protection of law by sending public notices and newsletters only to residents of Clark County. The Court concluded that the relevant class for equal protection analysis under the GMA was all County residents, not just landowners, and it was rational to distinguish residents living in the County doing the planning from landowners residing in other counties.

Isla Verde International Holdings, Inc. v. City of Camas, 146 Wn.2d 740, 49 P.3d 867 (July 11, 2002).

This decision did not interpret the GMA, but it is included here because it involves the appropriate exercise of local governments' authority to require open space set asides when approving development proposals.

This decision does not extinguish or limit local governments' obligation under the GMA to designate and preserve open space. *See* RCW 36.70A.020(9), .070(1), .110(2), .160, .165. The decision does require that local governments ensure that their decisions imposing conditions on development are supported by evidence in the record sufficient to demonstrate the conditions are reasonably necessary to address specific and direct impacts expected from the proposed development.

Factual and Procedural Background

A developer brought a LUPA action challenging conditions imposed by the City of Camas for approval of a preliminary plat for residential subdivision. The challenged conditions included a 30% open space set aside and the construction of a secondary limited access road into the development for emergency vehicles.

The Superior Court held both conditions unconstitutional and unlawful. The Court of Appeals held the open space requirement constituted a constitutional taking but upheld the second requirement.

The Court's Decision

The Supreme Court held the open space set aside condition violated RCW 82.02.020. Having invalidated the condition on that basis, the Court declined to address the constitutional issue and held the Court of Appeals and Superior Court should not have reached the takings issue.

Development conditions, whether direct or indirect, may not be imposed automatically through legislation; they must be tied to a specific, identified, direct impact of a proposed development on a community. The Court explained that RCW 82.02.020 preempts local governments from imposing certain taxes. A tax, fee, or charge, either direct or indirect, imposed on development is invalid unless it falls within one of the exceptions specified in the statute. The City argued its open space set aside did not violate RCW 82.02.020 because it did not impose a tax, fee or charge on development, but was instead a police-power based condition imposed pursuant to RCW 58.17.110 to mitigate direct impacts of the proposed development. The Court disagreed, concluding first that RCW 82.02.020 itself contemplates that a required dedication of land or easement is a tax, fee or charge; and second that the City had not established that the 30 percent open space set aside was reasonably necessary as a direct result of the proposed subdivision or reasonably necessary to mitigate a direct impact that was a consequence of the proposed subdivision.

The Court also explained that a legislative determination of the need for open space in the community generally does not satisfy the exceptions in RCW 82.02.020.

The Court held the developer failed to establish unconstitutionality or other invalidity of the secondary access road condition.

Lewis County v. Western Washington Growth Management Hearings Board, 113 Wn. App. 142, 53 P.3d 44 (Aug. 23, 2002).

Factual and Procedural Background

Citizens in Lewis County prevailed in challenges before the Western Board. The County appealed two decisions of the Board in Superior Court, but did not pay the filing fee. When the filing fee was not paid within 30 days, the Superior Court questioned its jurisdiction to hear the appeals. The County subsequently paid the filing fee in each appeal, but after briefing and argument, the Court held it lacked jurisdiction because the County had not timely paid the filing fees. Lewis County obtained appellate review.

The Court's Decision

The Court of Appeals affirmed.

To obtain judicial review of a decision of a Growth Management Hearings Board, a county must file its appeal and pay a filing fee within the 30-day period specified in RCW 36.70A.300(5). This requirement is jurisdictional. The Court first explained that RCW 36.70A.300(5) specifies the time for obtaining judicial review (30 days) and cross references two other statutes. One of the referenced statutes, RCW 34.05.514(1), provides that an appeal is instituted by filing a petition and paying a filing fee in any of three venues; the other referenced statute, RCW 36.01.050(1), provides that when a county appeals, it may do so in any of three venues. The three venues provided for in RCW 34.05.514(1) and RCW 36.01.050(1) may be the same or different. The Court held Lewis County could select venue for its appeal under either RCW 36.01.050(1) or RCW 34.05.514(1), but it must institute its appeal by filing a petition for judicial review and paying a filing fee under RCW 34.05.514(1) and RCW 36.18.020(2)(c) (specifying the amount of the filing fee).

Next, the Court held the County, to appeal, must file a petition and pay the filing fee within 30 days of the order being appealed, pursuant to RCW 36.70A.300(5) (specifying the 30-day time limit) and RCW 36.70A.514(1) (providing that a petition for review is instituted by paying the fee required in RCW 36.18.020). The Court held RCW 36.18.060 does not override that requirement when the appellant is the state or a county; rather, the Court harmonized the statutes by holding a county need not pay a filing fee when it first files an appeal of the Board's decision, but it must pay the filing fee within 30 days of the order being appealed.

Finally, the Court of Appeals held the County's failure to pay the filing fee within 30 days of the order being appeal deprived the Superior Court of jurisdiction. The Court found no compelling reason to waive the jurisdictional defect in this case.

Chelan County v. Nykreim, 146 Wn.2d 904, 52 P.3d 1 (July 25, 2002).

This decision did not interpret the GMA, but it is included here because it limits the opportunity for a local government to appeal its own land use decision, even where that decision may be contrary to law.

The GMA places primary emphasis on the comprehensive plan and implementing development regulations to achieve its goals. This decision demonstrates how the best-laid plans and regulations may be rendered ineffective if they are not applied effectively and consistently to development and land use applications. Because it was a 5-4 decision, this case may not be the final word on the issue.

Factual and Procedural Background

After Nykreim and others acquired a 40-acre parcel in rural Chelan County, they filed an application for a boundary line adjustment delineating three lots, representing that the parcel previously had been subdivided into three lots. The County approved the application without providing public notice, believing approval to be consistent with RCW 58.17.040(6), which allows an applicant to avoid statutory subdivision requirements if the lot line adjustment does not create new lots.

The landowners then applied for three conditional use permits to allow the construction of a residence on each of the three lots. Several neighbors intervened, concerned the proposed residences were intended for transient overnight rentals. One of the neighbors alleged the boundary line adjustment violated RCW 58.17.040(2), the applicable County Code, and the boundary lot line adjustment criteria provided in the County boundary line adjustment application and in case law. In response, the County Planning Department reviewed the transaction and withdrew the previously issued certificate of exemption, thus effectively revoking the boundary line adjustment.

Chelan County petitioned the Superior Court for a declaration as to the propriety of the boundary line adjustment. In response, the

landowners claimed damages under RCW 64.40 if the Court ruled for the County. The Superior Court ruled for the County and dismissed the landowners' claim for damages, finding the County had acted within its authority in revoking an erroneously approved boundary line adjustment. The Court of Appeals affirmed.

The Court's Decision

The Supreme Court accepted review to decide whether the County should have sought review under LUPA. The landowners argued judicial review of the boundary line adjustment should have been barred because the County did not timely file a petition for review within 21 days under LUPA. The neighbors and the County asserted LUPA did not apply because the boundary decision was ministerial and LUPA applied only to quasi-judicial decisions.

A county is barred from seeking declaratory relief in lieu of a LUPA action to obtain judicial review of its own land use decision. The Supreme Court held LUPA applies to both ministerial and quasi-judicial land use decisions. Because the County had standing under LUPA as an aggrieved or adversely affected person, LUPA provides the exclusive means for the County to have proceeded in Superior Court. The County therefore was barred from seeking declaratory relief in lieu of a LUPA action.

A county's land use decision becomes valid after the deadline for bringing a LUPA petition has passed. Having held LUPA applied, the Court concluded this case was governed by *Wenatchee Sportsmen Ass'n v. Chelan Cy.*, 141 Wn.2d 169, 4 P.3d 123 (2000),[53] under which the boundary line adjustment became valid, despite its questionable legality, once the deadline for challenging it under LUPA had passed. The Court made it clear that the boundary line decision did not limit the County's authority to act appropriately upon future permit applications by the landowners.

The Dissent

Four members of the Court[54] would have affirmed the Court of Appeals. They would have held the County did not have standing under LUPA because it was not aggrieved or adversely affected by its own land use decision. In that event, a LUPA action would not be available and the 21-day time bar in LUPA would not apply to this action.

City of Burien v. Central Puget Sound Growth Management Hearings Board, 113 Wn. App. 375, 53 P.3d 1028 (Sept. 13, 2002).

Factual and Procedural Background

In an attempt to settle litigation regarding plans for the proposed third runway at Seattle-Tacoma International Airport, the City of SeaTac and the Port of Seattle entered into a confidentiality agreement to protect the settlement negotiations. The confidential negotiations led to an Interlocal Agreement between the City and the Port which was to govern development of the Airport. The Agreement provided that (1) the City and the Port adopt and implement the planning, land use, and zoning provisions set forth in the Agreement; (2) they would engage in cooperative comprehensive planning related to the Airport and the City's economic development and land use goals; (3) the Agreement would control any conflict with other provisions of their respective comprehensive plans; (4) by a date certain, the City and the Port each would adopt a coordinated land use plan consistent with the Agreement; and (5) the Port would pay SeaTac $26 million dollars as "community relief."

The City of Burien filed a petition for review with the Central Puget Sound Growth Management Hearings Board, in which it alleged SeaTac had not complied with the

[53] In *Wenatchee Sportsmen*, discussed above at page 17, the Court dismissed a LUPA challenge as untimely, even though the challenged residential project constituted impermissible urban growth outside of the designated interim urban growth area. Relying on RCW 36.70C.040(2), the Court held the approval of the project became valid once the opportunity to challenge it passed.

[54] Justices Alexander (who authored the dissent), Owens, Johnson, and Madsen.

GMA's public participation requirements. The Board reviewed SeaTac's amendments adopted pursuant to the Interlocal Agreement, and upheld the amendments as compliant with the GMA. The Superior Court affirmed the Board.

The Court's Decision

The Court of Appeals affirmed the Board's ruling as to its jurisdiction, holding the Interlocal Agreement and the negotiations that produced it were not executed under the GMA and therefore were not subject to the public participation requirements in RCW 36.70A.140 over which the Board has jurisdiction. The Court also agreed the Board could review the process by which portions of the Agreement became amendments to the plan or zoning code. The Court upheld the Board's determination the amendments complied with the GMA.

Gobin v. Snohomish County, 304 F.3d 909 (9th Cir., Sept. 18, 2002), *cert. denied,* 123 S. Ct. 1488 (Mar. 10, 2003).

This decision does not interpret the GMA, but it is included here because it addresses the jurisdiction of a local government to apply land use regulations on an Indian reservation. Absent a treaty provision, express authorization by Congress, an agreement with Tribal government, or very exceptional circumstances, comprehensive plan provisions and development regulations adopted under the GMA appear not to apply to reservation land.

Factual and Procedural Background

Snohomish County asserted land use jurisdiction over a proposed building project located on Tulalip reservation land owned by registered tribal members. The Tulalip Tribe had adopted land use regulations that would allow 25 homes in the project; the County's land use regulations would allow 10 homes. The completed homes would be sold without regard to tribal membership. The landowners sought a declaratory judgment that the County lacked such jurisdiction over her lands. The District Court agreed with the landowners.

The Court's Decision

The Court of Appeals affirmed, holding (1) the right of Indians to alienate their lands freely does not provide the County a right to impose land use regulations over those lands; (2) Congress did not authorize state and local land use regulation over Indian fee lands when it made those lands freely encumberable; and (3) no exceptional circumstances were present that would warrant County jurisdiction in this case.

Citizens for Responsible Rural Development v. Timberlake Christian Fellowship, 114 Wn. App. 174, 61 P.3d 332 (Sept. 23, 2002), *review denied,* 149 Wn.2d 1013 (May 28, 2003).

Factual and Procedural Background

A church applied for a conditional use permit to build an 80,000 square-foot building on a 63-acre site in rural King County. A group of citizens opposed the application, arguing the proposed building violated the GMA's prohibition of urban growth in the rural area and asking that the building be limited to 20,000 square feet. The County's Department of Development and Environmental Services approved a scaled-down building of 48,500 square feet, but a hearing examiner determined that size limitation illegally burdened the church's religious freedom and remanded for assessment of visual impacts.

The church, the citizens, and the County all filed LUPA petitions in Superior Court. The Court held the hearing examiner erred in concluding the size limitations violated the church's religious freedom, and it remanded for further review.

A second hearing examiner upheld the size limitation, but left open the possibility of a second application for subsequent expansion.

The church and the citizens again filed LUPA petitions in Superior Court. The Court affirmed the hearing examiner's conclusion, but held the examiner erred in using comprehensive plan policies as site-specific decision criteria. The Citizens appealed.

The Court's Decision

The Court of Appeals affirmed the Superior Court, but reinstated the second hearing examiner's decision, finding the hearing examiner had not inappropriately examined the comprehensive plan policies.

Although the GMA and comprehensive plans do not serve as development regulations, parties are not prevented from arguing that a specific discretionary approval is inconsistent with the GMA or comprehensive plan policies. The Court of Appeals rejected the church's argument that neither the GMA nor the comprehensive plan may be applied directly at the project-review level. Acknowledging a conflict between the comprehensive plan and zoning regulations must be resolved in favor of the regulations, the Court held parties are not prevented from arguing that a specific discretionary approval is inconsistent with the GMA or comprehensive plan policies. Such arguments must be analyzed, however, by looking to the GMA and the comprehensive plan to determine whether the local government unreasonably has interpreted its conditional use permit criteria or abused its discretion in imposing conditions on the project.

A proposed urban use may be allowed in the rural area if, by its very nature, it is dependent upon being in a rural area and it is functionally and visually compatible with the rural area. The Court adopted the analysis of the Central Board that a proposed use that meets the GMA's definition of urban growth nevertheless may be allowed in the rural area as long as "the use, by its very nature, is dependent upon being in a rural area and is compatible with the functional and visual character of rural uses in the immediate vicinity[.]"[55]

Applying that standard in this case, the Court upheld the hearing examiner's findings that (1) there was a sufficient nexus between the proposed location of the church and the area where the largest concentration of the church's members lived, and (2) the proposed project was compatible with the surrounding rural residential neighborhood. The Court explained that the purpose of the GMA is not necessarily frustrated every time urban growth occurs in the rural area, and that churches are not purely rural or urban uses, but fall within a gray zone.

[55] 114 Wn. App. at 184, quoting from *Vashon-Maury v. King County*, CPSGMHB No. 95-3-0008, Final Decision and Order (Oct. 23, 1995).

Thurston County v. The Cooper Point Association, 148 Wn.2d 1, 57 P.3d 1156 (Nov. 21, 2002).

Factual and Procedural Background

Property owners and others challenged Thurston County's decision to extend a sewer line from the regional treatment facility in downtown Olympia approximately four miles up the Cooper Point Peninsula to serve two pre-GMA developments whose sewage systems were projected to fail. The Western Washington Growth Management Hearings Board found the sewer line extension violated RCW 36.70A.110(4), which prohibits governments from extending or expanding "urban governmental services" into rural areas, except in those limited circumstances shown to be "necessary to protect basic public health and safety and the environment."

The County obtained direct review of the Board's decision in the Court of Appeals, which affirmed the board at 108 Wn. App. 429, 31 P.3d 28 (2001). The County then obtained review in the Supreme Court.

The Court's Decision

The Supreme Court affirmed the Board.

The court first determined the sewer line extension was not simply a "replacement" for urban services already existing in the two developed areas, but rather an "extension" of urban services into the rural area. The court rejected the county's argument that the two developed areas were not really "rural" because of their densities; the court would not allow the county to disavow its comprehensive plan's designation of the Cooper Point area as "rural" and noted the Cooper Point area has characteristics consistent with the GMA's definition of "rural."

The exception in RCW 36.70A.110(4) must be applied narrowly to protect the rural area for urban sprawl, consistent with the Legislature's intent in enacting the GMA. The Court addressed the language in RCW 36.70A.110(4) providing an exception where "necessary to protect basic public health and safety and the environment." The County advocated a broad definition of "necessary" that would allow it to anticipate and prevent future wastewater management problems that could jeopardize public health and safety and the environment. The Court instead upheld the Board's more restrictive definition of "necessary" as better carrying out the Legislature's intent in enacting the GMA to protect the rural character of an area.

Deference to local policy choices is appropriate only if those choices are consistent with the goals and requirements of the GMA. The Court refused under RCW 36.70A.3201 to require deference to the County's interpretation of "necessary," holding deference is given only to local policy choices that are consistent with the goals and requirements of the GMA. Because the County's proposal did just what the GMA prohibits—extending an urban governmental service into a rural area—the Board was not required to accord deference to County's definition of the term "necessary."

A site-specific development permit must be at issue for RCW 4.48.370 to provide for attorney's fees. The Court held the property owners were not entitled to attorney fees under RCW 4.84.370, which applies only to development permits involving site-specific determinations.

The Dissent

Three justices[56] would have held for the County, based primarily on their contention that the Court gave too much weight to the rural protection goals of the GMA and their belief that the Growth Management Hearings Boards generally should defer to local governments' balancing and harmonizing of the GMA's planning goals.

[56] Justices Sanders (who authored the dissent), Ireland, and Bridge.

APPELLATE DECISIONS IN 2003

City of Redmond v. Central Puget Sound Growth Management Hearings Board, 116 Wn. App.48, 65 P.3d 337 (Mar. 3, 2003), *review denied*, 77 P.3d 651 (Sept. 30, 2003).

Factual and Procedural Background

The southern end of the Sammamish River Valley lies within the municipal boundary of the City of Redmond. Since the 1960s, the city zoned that portion of the valley lying within its borders as agricultural. When the City of Redmond adopted its comprehensive plan in 1995, it reaffirmed the agricultural designation of the Sammamish River Valley lands within its jurisdiction.

Landowners challenged the agricultural designation of their property, alleging their land was not "primarily devoted to" agriculture since it was not in current agricultural use. The City responded that individual parcels do not need to be in current agricultural use to be designated as agricultural and argued the GMA requires an area-wide rather than a parcel-specific approach. In *City of Redmond v. Central Puget Sound Growth Mgmt. Hrgs. Bd.*, 136 Wn.2d 38, 959 P.2d 1091 (1998), the Court held the City of Redmond had correctly interpreted the "primarily devoted to" requirement, but concluded the agricultural designation was invalid because the City had failed to implement a program authorizing transfer or purchase of development rights as required in RCW 36.70A.060(4).

While the appeal was pending, however, the City changed the designation and zoning in the valley lands from agricultural to interim urban recreation. A citizen challenged the new designation and zoning in a petition to the Central Puget Sound Growth Management Hearings Board.

The Board characterized the threshold question whether lands that have been

designated and regulated as agricultural lands of long-term commercial significance can be "de-designated" and, if so, under what conditions. Although there is no provision in the GMA explicitly mentioning or authorizing de-designation, the Board held agricultural lands may be de-designated "if the record shows demonstrable and conclusive evidence that the Act's definitions and criteria for designation are no longer met."

Relying on the Supreme Court's definition of "devoted to" in *City of Redmond*, 136 Wn.2d at 53, the Board found the soil attributes of the land had not changed and that the land was capable of being used for agriculture. Applying the second criterion, that the land be of "long-term commercial significance," the Board found the City had improperly "de-designated" two parcels.

However, accepting the City's argument that the time for agriculture in the valley had passed because of development pressures, the Board held the second criterion no longer was satisfied for the other "de-designated" parcels: "Even if lands have prime soils, and have been historically farmed, it does not follow that they must remain designated as agricultural resource lands if a significant physical change has occurred to destroy the long-term viability of those parcels as agricultural land."

The Superior Court upheld the Board in all respects. The City of Redmond and youth sports advocates appealed.

The Court's Decision

Division One of the Court of Appeals reversed.

The Court concluded the Board impermissibly placed the burden on the City of Redmond to prove the validity of its "de-designation." The GMA requires the board to presume a challenged ordinance is valid, and the challenger has the burden of establishing invalidity.

In addition, the Court found that the ordinance purporting to apply an agricultural designation to the properties at issue was never effective.

Diehl v. Western Washington Growth Management Hearings Board, 118 Wn. App. 212, 75 P.3d 975 (Sept. 2, 2003).

Factual and Procedural Background

When the Western Washington Growth Management Hearings Board found Mason County complied with GMA goals and requirements relating to rural lands, Mr. Diehl sought judicial review of the Board's decision. The County challenged the sufficiency of Mr. Diehl's service of his petition for judicial review.

The Superior Court ruled that RCW 34.05.542 and CR 4 both governed service of the petition and indicated it would dismiss Mr. Diehl's petition for review for failure of service unless he provided "a declaration in the proper form pursuant to CR 4(c) and 4(g)."[57] Mr. Diehl explained his service to the Board, but did not provide a sworn affidavit or service or its equivalent and did not state where he served the Board, the Superior Court, or the County Prosecutor. The Superior Court dismissed his petition.

Mr. Diehl obtained review in the Court of Appeals.

The Court's Decision

The Court of Appeals affirmed.

In a petition for judicial review of a Board's decision under the Administrative Procedure Act (APA), proof of service is governed by CR 4(g). Mr. Diehl argued that the Administrative Procedure Act (APA), RCW 34.05—not CR 4—provides the service requirements for an appeal from the Board to Superior Court. The Court agreed, but held that proof of having met those requirements is governed by CR 4(g).

Citing RCW 34.05.510(2), the Court held proof of service is an "ancillary procedural matter" that is covered by CR 4(g). The Court also held that application of the requirements in CR 4(g) is not inconsistent with the APA, since the APA is silent as to what constitutes

[57] 75 P.3d at 976.

sufficient proof of compliance with its service requirements:

> Thus, CR 4(g) fills a statutory gap by explaining what evidence the petitioner must present to prove compliance with the APA's service requirements. It requires an affidavit of the person performing service, and, for service other than by publication, the affidavit must state where service was performed. CR 4(g)(2), (4), (7).[58]

The Court noted that Mr. Diehl's failure to comply with CR4(g) was not fatal if he nonetheless established that he complied with the APA's service requirements. Finding he did not do so, the Court held that dismissal was proper.

Low Income Housing Institute v. City of Lakewood, 119 Wn. App. 110, 77 P.3d 653 (Sept. 9, 2003).

Factual and Procedural Background

The Low Income Housing Institute (LIHI) challenged Lakewood's comprehensive plan, alleging that it did not further GMA affordable housing goals and was inconsistent with Pierce County's county-wide planning policies addressing affordable housing.

The Central Puget Sound Growth Management Hearings Board found that LIHI did not demonstrate noncompliance with a specific requirement of the GMA. The Board also held that LIHI did not carry its burden to show inconsistency between the provisions of Lakewood's comprehensive plan and the requirements of Pierce County's county-wide planning policies.

The Superior Court affirmed.

The Court's Decision

The Court of Appeals reversed.

A Growth Management Hearings Board must consider both the GMA's goals and its requirements when determining whether a comprehensive plan complies with the GMA. The Court held the Board had failed to address whether Lakewood's comprehensive plan furthered RCW 36.70A.020(4) (encouraging the availability of affordable housing). Citing RCW 36.70A.320(3) and *King County v. Central Puget Sound Growth Management Hearings Board*, 142 Wn.2d 543, 562, 14 P.3d 133 (2000), the Court held that the Board is required to consider both the GMA's goals and its specific requirements in determining whether a plan complies with the GMA. Accordingly, the Court held the Board erred by not considering whether and how the Lakewood comprehensive plan "[e]ncourage[d] the availability of affordable housing to all economic segments of the population . . . promote[d] a variety of residential densities and housing types, and encourage[d] preservation of existing housing stock" as required by the affordable housing goal set forth in RCW 36.70A.020(4).

A Growth Management Hearings Board must decide all issues requiring resolution. The Court reversed the Board's conclusion that LIHI had not carried its burden to show inconsistency between the provisions of Lakewood's comprehensive plan and the requirements of Pierce County's county-wide planning policies. The Court held the Board made no findings regarding the City's current need for affordable housing or how the comprehensive plan would affect the future of affordable housing. Because the Board did not present the basis for its decision, the Court held the Board had failed to decide all issues requiring resolution, as required by RCW 36.70A.290(1) and RCW 34.05.570(3)(f).

The Court held the Board erred as a matter of law when it evaluated compliance only with the first requirement of the county-wide planning policies (the requirement to identify and inventory the demand for affordable housing) but not the county-wide planning policies as a whole.

[58] 75 P.3d at 978.

Whidbey Environmental Action Network v. Island County, 118 Wn. App. 405, 76 P.3d 1215 (Sept. 29, 2003).

Factual and Procedural Background

Whidbey Environmental Action Network (WEAN) and others challenged Island County's Comprehensive Plan, zoning code, and fish and wildlife habitat conservation areas regulations. WEAN prevailed on several issues before the Western Washington Growth Management Hearings Board. Both WEAN and the County obtained review in Superior Court, which ruled in favor of Island County on all issues. WEAN appealed to the Court of Appeals.

The Court's Decision

The Court of Appeals upheld the Board and reversed the Superior Court in part.

To raise procedural challenges to the Superior Court's review, under the Administrative Procedure Act, of a decision of the Growth Management Hearings Board, the challenger must demonstrate it was prejudiced by the Superior Court's alleged procedural error. WEAN argued the Superior Court exceeded its authority by reaching the ultimate issue (compliance with the GMA) rather than remanding to the Board, contrary to RCW 34.05.574(1). WEAN also argued the Superior Court failed to review the entire administrative record, as required in RCW 34.05.570. The Court of Appeals rejected these claims because WEAN did not show it had been prejudiced by the alleged judicial errors, as required in RCW 34.05.570.

The Court of Appeals then addressed the rural densities adopted by the County.

The GMA does not require any particular methodology for providing a variety of rural densities and uses in the rural element of the comprehensive plan. A county that plans under RCW 36.70A.040 must adopt a rural element in its comprehensive plan that provides for a variety of rural densities, whether or not the county contains any "significant blocks" of undivided land. RCW 36.70A.070(5)(d). The Court of Appeals held the Board erred by ruling otherwise.

Under the GMA, a county can account for unique local conditions in drafting the rural element of its comprehensive plan. Although the Board erred in its use of the "significant blocks" test, the Court affirmed the Board's decision finding the rural element in compliance, based on the Board's assessment of the unique circumstances in Island County. The Board looked at the relatively high population density in the County, the fact that 70% of the County's population lived in the rural area, the relatively small amount of remaining land that could be subdivided to create 5- or 10-acre lots, the relative absence of recent subdivision, the "alternative regulations" the County adopted to protect rural character, and the "decidedly rural density" of 5- and 10-acre zoning.[59] The Court of Appeals held that this analysis justified the Board's approval of the County's rural densities

Evidence of the best available science must be included in the record and must be considered substantively in the development of critical areas policies and regulations. The Board concluded that some of the stream buffers the County adopted to protect fish and wildlife habitat conservation areas were not supported by the scientific information in the record before the County. The Court of Appeals affirmed, rejecting the County's argument that the Board must defer to the local government's discretionary balancing of the best available science with other factors. The Court explained that RCW 36.70A.172(1) requires the best available science to be included in the record and considered substantively in the development of critical areas policies and regulations.[60] The Court briefly reviewed the science in the record and held the Board's disapproval of the stream buffers was supported by sufficient evidence.

The Growth Management Hearings Boards are free to choose from among competing

[59] 76 P.3d at 1221.

[60] 76 Wn.2d at 1222-23, citing *Honesty in Environmental Analysis & Legislation (HEAL) v. Central Puget Sound Growth Management Hearings Board*, 96 Wn. App. 522, 532, 979 P.2d 864 (1999).

scientific evidence in the record in assessing whether the County properly included the best available science. The Court rejected the County's argument that the Board acted arbitrarily and capriciously by rejecting the evidence provided by the County's scientific consultant. The Court explained that the Board did not willfully disregard expert opinion, but simply disagreed with the County as to the content of the best available science presented to the Board. The Court also explained that when the Board observes that the majority of scientific information in the record supports a specific conclusion and explains its reasoning, it has not inappropriately relied on a preponderance of the evidence (rather than the clearly erroneous standard required under RCW 36.70A.320(3)).

The GMA requires that critical areas regulations protect <u>all</u> functions and values of the designated areas. The Court affirmed the Board's rejection of the evidence offered by the County's scientific consultant as to some stream buffers because it did not address wildlife species other than fish in recommending buffers to protect fish and wildlife habitat conservation areas.

To the extent a County relies on a previously-adopted ordinance to protect critical areas, that prior ordinance may be challenged for compliance with the GMA's best available science requirements. In 1998, the County amended a 1992 wetlands ordinance to provide protection for fish and wildlife habitat. In 1998, the County relied partly on a 1992 wetlands ordinance to protect fish and wildlife habitat conservation areas. When WEAN sought to challenge that reliance, the County argued the Board lacked subject matter jurisdiction over the wetlands ordinance and exceeded its authority by requiring the 1992 ordinance to comply with the best available science requirement (adopted by the Legislature in 1995).

The Court rejected both of the County's arguments.:

> The County decided to use the 1992 wetlands regulations to satisfy the 1995 GMA requirement to protect wildlife in the County's 1998 ordinance. Thus, the 1992 wetlands regulations were subject to challenge to the extent the County relied on them to fulfill the obligations imposed by the 1995 GMA amendments. To the extent the 1992 regulations failed to include BAS, they are inadequate to protect wildlife.
>
> No other conclusion makes sense. If the County is relying substantively on the wetlands buffers to satisfy its obligation under RCW 36.70A.172 for the protection of fish and wildlife habitat critical areas, those preexisting regulations must be subject to the applicable critical areas analysis to ensure compliance with GMA requirements. Otherwise, a county could use myriad preexisting regulations in an attempt to satisfy GMA critical areas requirements without actually having to include BAS analysis. This would contravene RCW 36.70A.172.[61]

An exception from critical areas regulations for agricultural activities must be supported by evidence in the record that such an exception is necessary and that the best available science was employed in crafting of the exception. The County exempted all existing and on-going agricultural activities from critical areas regulations when those activities are "undertaken pursuant to best management practices to minimize impacts to critical areas."[62] The exemption applied to all such agricultural activities in the rural area, whether or not they were conducted on land designated as agricultural land of long-term commercial significance under RCW 36.70A.170. The Court affirmed the Board, holding there was no evidence in the record to support such a broad exemption or to demonstrate that best available science was used in crafting the exception.

[61] 76 P.3d at 1227.

[62] 76 P.3d at 1228.

City of Bellevue v. East Bellevue Community Municipal Corp., 119 Wn. App. 405, 76 P.3d 1215 (Dec. 15, 2003).

Factual and Procedural Background

RCW 36.70A.070(6)(a)(iii)(B) requires cities planning under the GMA include in their comprehensive plans a transportation element that, among other things, specifies "level of service" standards to set maximum acceptable levels of traffic congestion for local streets and roads. RCW 36.70A.070(6)(b) requires that cities adopt a concurrency ordinance that prohibits development that causes a decline in level of service below the adopted standards, unless transportation improvements or strategies to accommodate the impacts of development are made concurrent with the development.

The City of Bellevue adopted a concurrency ordinance that exempted certain types of projects from its concurrency requirements. When it added neighborhood shopping center redevelopment projects to the list of exemptions, the East Bellevue Community Corp. challenged it before the Central Puget Sound Growth Management Hearings Board.

The Board held RCW 36.70A.070(6)(b) does not permit exemptions to a concurrency ordinance and invalidated the exemption as substantially interfering with the GMA's concurrency goal, RCW 36.70A.020(12).

Bellevue appealed.

The Court's Decision

Bellevue argued that the East Bellevue Community Corp. lacks statutory authority to file petitions with the Growth Management Hearings Board. The Court of Appeals agreed, but reviewed the Board's decision because other petitioners had raised the same issues to the Board.

Concurrency is a requirement of the GMA. On the merits, the Court of Appeals upheld the Board. Bellevue argued that the concurrency requirement cannot trump all other goals of the GMA. The Court responded that concurrency is not a goal, but a requirement of the GMA, and that the Board's invalidation of Bellevue's exemption created no conflict between provisions of the GMA. Concurrency is one of several factors in RCW 36.70A.070 that must be satisfied in order to allow development.

A city may not exempt development proposals or categories of developments from its concurrency ordinance. If a proposed development project violates the city's adopted level of service standards, the city has a variety of options available to it. These may include changing the relevant levels of service, modifying traffic patterns to reduce traffic congestion, or creatively addressing traffic mitigation expenses. But a city cannot simply exempt the proposal from compliance with traffic standards it has adopted pursuant to the GMA. Under the clear and plain language of RCW 36.70A.070(6)(b), a city cannot create exemptions to its concurrency ordinance.

Quadrant Corp. v. Growth Management Hearings Board, ___ Wn. App. ___, 81 P.3d 918 (Dec. 29, 2003).

Factual and Procedural Background

Two citizens groups challenged King County's designation of the "Bear Creek island" as an urban growth area in 1994. The Central Puget Sound Growth Management Hearings Board found the designation did not comply with the GMA and remanded to the County with instructions to do one of the following: (1) delete the Bear Creek area from the UGA; (2) make the Bear Creek island a fully-contained community if it met the requirements of RCW 36.70A.350; or (3) adequately justify its inclusion in the UGA under RCW 36.70A.110. The Board ultimately was upheld in *King Cy. v. Cent. Puget Sound Growth Mgmt. Hrgs Bd.*, 138 Wn.2d 161, 979 P.2d 374 (1999).[63] In that case, the Supreme Court remanded to the Board to determine whether King County's redesignation of the Bear Creek island as a fully-contained community complied with the GMA or, alternatively, whether the County had justified

[63] *See* above at page 4.

the Bear Creek urban designation under RCW 36.70A.110.

On remand, the Board again determined that the Bear Creek island did not meet the statutory requirements for designation as an urban growth area because the property was not "already characterized by urban growth" and not "adjacent to lands characterized by urban growth." The Board decided that the phrase "characterized by urban growth" speaks to the built environment, and that it is used in the present tense thereby excluding planned or permitted development from consideration. But the Board also concluded that the Bear Creek island satisfied the fully-contained community designation enacted by the County following the Board's earlier remand.

All parties appealed. The Superior Court reversed.

The Court's Decision

The Court of Appeals reversed and vacated the Superior Court judgment and affirmed the Board.

RCW 36.70A.110(1) provides that an urban growth area may include territory located outside of a city only if that territory "already is characterized by urban growth," or is "adjacent to territory already characterized by urban growth," or is a designated new fully-contained community as defined by RCW 36.70A.350.

In RCW 36.70A.110, the phrase "already characterized by urban growth" refers to existing development, not development that has been permitted but that has not yet occurred. Friends of the Law argued that "already characterized by urban growth" refers to growth already present. In contrast, King County and Quadrant Corp. argued that the phrase includes vested permits already issued for future development. The Court held that the legal concept of vesting, which means that a land use application, under the proper conditions, will be considered only under the land use statutes and ordinances in effect at the time of the applications submission, "is not readily transportable to the GMA concept of 'already characterized by urban growth,' and we are not persuaded that it should be."[64]

Growth Management Hearings Boards are not bound by CTED's technical assistance and guidance to local governments. The Court also rejected the argument that "the state's own directives to local government" required consideration of permitted development when determining whether territory is "already characterized by urban growth."[65] The Boards are not bound by CTED's technical assistance and guidance. Expressing concern that the position advanced by the County and Quadrant could result in different interpretations of the phrase "characterized by urban growth," the Court held that the goals of the GMA are better served by a consistent interpretation of the Act, "and the expertise of the GMA hearings board for interpretation of the GMA is a far more reliable basis for achieving such consistency than are the various counties."

A conflict between the goals in RCW 36.70A.020 and the specific requirements in subsequent sections of the GMA is resolved in favor of the specific requirements. The Superior Court had remanded to the Board for a determination whether the Bear Creek island could be fully-contained in fact and whether it complied with the GMA goal of protecting surrounding rural land from urban development. The Court of Appeals vacated that remand, finding no such requirement in the GMA's general planning goals.

More generally, the Court held that any conflict between the general goals in RCW 36.70A.020 and the specific requirements for fully-contained communities in RCW 36.70A.350, the specific requirements control. In this case, the County satisfied the specific requirements set forth in RCW 36.70A.350. Although the Court found no conflict in this case, it appears that this holding is not dictum because the Court of Appeals reversed a ruling by the Superior Court that had derived conflicting requirements from RCW 36.70A.020.

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[64] 81 P.3d at 922 (one judge dissenting).

[65] *Id.*

APPELLATE DECISIONS IN 2004

City of Olympia v. Drebick, ___ Wn. App. ___, 83 P.3d 443 (Jan. 22, 2004) (amended Feb. 18, 2004).

Factual and Procedural Background

Chapter 82.02 RCW, which authorizes local governments to levy impact fees on new development, was amended as part of the GMA. Mr. Drebick challenged a traffic impact fee levied on a new office building, alleging it violated RCW 82.02.050(3), which limits impact fees to no more than a "proportionate share" of system improvements that are "reasonably related to the new development." The City calculated the fee by averaging the cumulative traffic-related impacts of all new office buildings. A hearing examiner held that the fee could not exceed the individualized impacts of the specific building. The Superior Court reversed. Mr. Drebick appealed.

The Court's Decision

Impact fees must be reasonably related to the individualized effects of a particular project. Agreeing with the hearing examiner, the Court of Appeals construed RCW 82.02.050(3) to mean that impact fees must be reasonably related to the individualized effects of the particular project. The Court emphasized that its decision was limited to that single question. It did not address whether a city can perform the necessary assessment legislatively, by enacting an ordinance with narrow enough categories, or whether a city must perform the necessary assessment quasi-judicially.

Grant County Fire Protection District No. 5 v. City of Moses Lake, 145 Wn.2d 702, 42 P.3d 394 (Mar. 14, 2002), *vacated in part*, ___ Wn.2d ___, 83 P.3d 419 (Jan. 29, 2004).

This decision did not interpret the GMA, but it is included here because it has implications for planning to accommodate projected urban growth and provide urban services under the GMA. In 2002, the Supreme Court invalidated the most commonly used method of municipal annexation in Washington, which threatened to undermine the orderly provision of urban services within designated urban growth areas, as directed in RCW 36.70A.110.

In 2004, however, the Court vacated the portion of its decision that invalidated the petition method of annexation.

Factual and Procedural Background

The City of Moses Lake desired to annex an adjacent area within the designated urban growth area (UGA). To facilitate annexation, the City entered into "Extraterritorial Utility Extension Agreements" with seven corporate property owners in the area, under which the property owners would receive water and sewer services from the City and the City Manager would receive power of attorney to sign any future annexation petition on behalf of the property owners. In 1999, the City Manager petitioned for annexation and the City Council approved it. The annexation became effective in April 2000. The Grant County Fire Protection District and two property owners appealed the annexation, alleging it was unconstitutional.

At about the same time, the City of Yakima prepared to annex a mixed residential area adjacent to the City. The City signed "Outside Utility Agreements" with the owners of 198 of the 269 of the properties in the area to be annexed, under which the City would provide garbage and refuse service in exchange for consent to future annexation as though the owners had signed an annexation petition. In 1999, the City initiated annexation proceedings based on those agreements. The Boundary Review Board approved the annexation and it

became effective in September 2000. Yakima Fire District No. 12 and two property owners appealed the annexation as unconstitutional.

The two appeals were consolidated and heard on direct review by the Washington Supreme Court.

Legal Background

In Washington, there have been two primary methods of annexation provided for in statute. In the election method, annexation of contiguous unincorporated land may be initiated by petition or by a resolution of the city council, which is followed by an election open to voters living in the area to be annexed. *See* RCW 35.13.015 through .120 (non-code cities); RCW 35A.14.015 through .110 (code cities). In the petition method, annexation is initiated by a petition. If the city council accepts the petition, the initiating parties then may circulate a second petition which must be signed by the owners of at least 60% (code cities) or 75% (non-code cities) of the assessed property value in the area to be annexed. Once the second petition is filed, the city council may hold a public hearing and approve the annexation, although it is not required to do so. RCW 35.13.125 through .150 (non-code cities); RCW 35A.14.120 through .150 (code cities). Moses Lake is a code city incorporated under Title 35A RCW. Yakima is a non-code city operating under RCW 35.13. Both cities used the petition method of annexation in these cases.

The petition method was added by the Legislature in 1945 to address difficulties with the election method, which was criticized as "unworkable" and "burdensome" because it granted residents of fringe areas a veto over annexation, thus thwarting municipal planning, the logical expansion of cities, and the provision of urban services. The great majority of annexations in the last 57 years have been by the petition method.

The Court's 2002 Decision

The petition method of annexation violates Art. I, § 12 of the Washington Constitution, the state privileges and immunities clause, because it grants special privileges to owners of more highly-valued property [holding vacated in 2004]. The Court reasoned as follows:

1. The state privileges and immunities clause provides greater protection than the federal equal protection clause. The federal clause prohibits invidious discrimination and the denial of rights and privileges to persons discriminated against. In contrast, the state clause prohibits the granting of some special benefit. ***In other words, the federal clause prohibits discrimination, while the state clause prohibits favoritism.***

2. The petition method grants owners of more highly-valued property an "almost exclusive voice in the annexation process," a privilege not equally afforded to owners of lower valued property and nonproperty-owning residents.

3. There is no reasonable basis for granting large property owners this privilege. ***Cities may grow by annexing contiguous areas, but any grant of the power to petition for annexation must be provided on an equal basis to all similarly situated persons [holding vacated in 2004].***

Legislative Response

The 2003 Legislature responded to the original decision by amending RCW 35.13 and RCW 35A.14 to provide alternative means of annexing unincorporated islands surrounded by incorporated municipalities, *see* Laws of 2003, ch. 299, and to provide a direct petition method of annexation that avoids the constitutional infirmities identified by the Court, *see* Laws of 2003, ch. 331.

The Court's 2004 Decision

In a rare move, the Supreme Court granted the Cities' motions for reconsideration. The Court then consolidated into the reconsideration an appeal from the City of Snoqualmie that involved an attempt to annex a single large parcel owned by a corporation, which had been blocked by the Court's 2002 decision. Finally, nearly two years after its first decision, the Court

reversed itself and vacated part of its 2002 decision.

The Cities did not ask the Court to reconsider it independent analysis of the Privileges and Immunities Clause in Art. I, § 12; they instead asked the Court to reconsider how it applied that analysis to the petition method of annexation.

On reconsideration, the Court reaffirmed that the state Privileges and Immunities Clause requires an independent constitutional analysis. The Court appeared also to reaffirm its prior conclusion that ***while the federal Equal Protection Clause prohibits discrimination, the state Privileges and Immunities Clause prohibits favoritism.***

Departing from its prior holding, however, the Court held that the statutory right to petition for annexation is not a "privilege" for purposes of Art. I, § 12. The Court explained that the power of annexation is not a right of citizenship, but rather a power of the Legislature, and the Legislature may delegate that power to cities. On that basis, the Court concluded that ***the petition method of annexation did not violate the Privileges and Immunities Clause in Art. I, § 12 of the Washington Constitution.***